Study Commission on the Future of the Indiana Bar Examination

Notice of Meeting
Tuesday, June 11, 2019
1:30 PM

The next meeting of the Study Commission on the Future of the Indiana Bar Examination will be held on Tuesday, June 11, 2019 at 1:30 pm (Eastern time) in Room 319 of the Indiana State House.

Judith A. Gundersen, the President and CEO of the National Conference of Bar Examiners (NCBE), will be making a presentation to the Study Commission regarding the operations and activities of the NCBE, the Uniform Bar Examination and other matters pertinent to the development and administration of bar examinations.

Hon. Randall T. Shepard
Chair

Hon. Nancy H. Vaidik
Vice Chair

Study Commission on the
Future of the Indiana Bar Examination

Meeting Minutes
June 11, 2019

Members present: Hon. Randall T. Shepard (Chair); Hon. Nancy H. Vaidik (Vice Chair); Hon. Cristal Brisco; Hon. Kenton Kiracofe; Dean Andrew Klein; Yvette LaPlante; Jon Laramore; John Maley; Cathleen Shrader; Justin Forkner (Ex Officio); Bradley Skolnik (Ex Officio). The meeting convened at 1:30 p.m.

1. Call to Order

Chief Justice Shepard, Chair, called the meeting to order at 1:30 p.m.

Chief Justice Shepard and Chief Judge Nancy Vaidik, Vice Chair, welcomed the members of the Study Commission to the meeting and introduced the speaker, Judith A. Gundersen.

2. Presentation by Judith A. Gundersen

Judith A. Gundersen appeared in person before the Study Commission to make a presentation regarding the operations and activities of the National Conference of Bar Examiners ("NCBE"), the Uniform Bar Examination ("UBE") and other matters pertinent to the development and administration of bar examinations.

Ms. Gundersen is President and CEO of the NCBE. Prior to being named to her current position in August 2017, she served as the NCBE's Director of Testing. Before joining the staff of the NCBE, Ms. Gundersen served as a deputy prosecutor in Dane County, Wisconsin and worked in the trust department of U.S. Bank (f/k/a First Wisconsin) She holds a B.A. in Spanish and economics from the University of Wisconsin-Milwaukee and a J.D. from the University of Wisconsin School of Law.

Ms. Gundersen's remarks were accompanied by a PowerPoint presentation and she also provided each member of the Study Commission with a folder of materials containing information on test development, grading, the UBE and the NCBE Testing Task Force. A copy of the PowerPoint presentation is attached as Exhibit A and the folder of handouts is attached as Exhibit B.

According to Ms. Gundersen, the fundamental underlying principles of high-stakes testing consist of Reliability, Validity and Fairness to Examinees. The purpose of the bar exam is the protection of the public – identifying those who are minimally competent for the entry-level practice of law. Among other things, it is important to consider the cost and practicality of the test.

Ms. Gundersen emphasized that if an exam is to be fair, it must be consistent from one exam administration to another. It should not matter when an applicant takes the exam. It is critical

that the bar exam be the same (without using the same questions) from one administration to the next if it is going to be fair to all examinees.

Mr. Gundersen then briefed the Study Commission members on the UBE. The UBE is a uniformly administered, graded and scaled bar exam that results in a portable score, but not a portable status.

Applicants who take the UBE may transfer scores to other UBE jurisdictions in an effort to seek admission in those jurisdictions. Each state decides for how long to accept the transfer of scores from another jurisdiction. Eligibility for admission, however, including cut scores, character and fitness standards and other requirements are determined by each individual jurisdiction. In response to an inquiry from Chief Judge Vaidik, Ms. Gundersen indicated that, although it varies, a sizeable number of states will accept UBE scores from another state for at least three years. The rationale behind allowing for portability of scores from one state to another is to enhance mobility and employment opportunities for attorneys entering the profession.

The UBE tests knowledge of general principles of law, legal analysis and reasoning, factual analysis and communication skills to determine an applicant's readiness to enter the legal profession. It consists of three components: the Multistate Performance Test ("MPT"), the Multistate Essay Examination ("MEE"), and the Multistate Bar Examination ("MBE"). The three components of the exam are weighted as follows: MPT 20%; MEE 30% and MBE 50%. The MBE is weighted so heavily in order to ensure reliability. Testing experts contend that if the multiple-choice MBE is weighted less than 50%, it will reduce the reliability of the exam. Ms. Gundersen noted that Indiana already tests on the MBE and MPT so the MEE is the only portion of the UBE that would be new for us.

Even among non-UBE jurisdictions, almost all states scale to the MBE. Only three jurisdictions do not scale to the MBE. According to Ms. Gundersen, this is because the MBE is a "reliability anchor." The NCBE uses various equators to ensure that score scales are reliable and consistent from one administration to another. By anchoring to the MBE, the NCBE controls for consistency and reliability.

In response to a question from Chief Judge Vaidik, Ms. Gundersen observed that the MBE is weighted 50% because it is a more reliable measure of knowledge and skills than the written portions of the exam. If the MBE is weighted less than 50%, it has an adverse impact on test reliability. In order to be successful, an applicant must do well on both the written and the multiple-choice components of the exam. If an applicant tanks on one portion of the exam because he or she focused only on the other portion, it will not be possible to pass. Rather than separately scoring the MBE and the written components of the exam, most states use a combined score.

The scoring and weighting of the current Indiana bar exam is similar to the UBE. On the Indiana exam, the MBE (50%) and the MPT (20%) are weighted the same as on the UBE. And, the six question Indiana Essay Exam (30%) is weighted the same as the six question MEE is on the UBE. There are, however, some differences on topics tested on the Indiana Essay Exam and the MEE as demonstrated on one of the slides on Ms. Gundersen's PowerPoint presentation.

Indiana's current cut score of 264 is well within the mainstream of cut scores in UBE jurisdictions. The lowest cut score of any UBE state is 260, with 80% of UBE jurisdictions having a cut score within the range of 260 to 270.

Although the UBE is a uniform test in which the same topics are tested in each jurisdiction, the NCBE is not the "gatekeeper" when it comes to bar admissions. That is still the role of each individual state. For example, the UBE jurisdictions all establish their own requirements for admission, set passing scores, make character and fitness decisions, set the maximum age for transferred UBE scores, administer the test, grade the MEE and MPT, and, if they so choose, develop and administer separate state-specific law components.

The individual states also send representatives to meetings of the UBE Policy Committee, a forum at which important UBE issues are discussed by the jurisdictions. There is also a "stakeholder review" by the MEE/MPT Committee one year prior to the administration of the exam to provide feedback to MEE and MPT Drafting Committees. In addition, UBE jurisdictions review MPT and MEE several months prior to the exam.

The NCBE develops the MEE, MPT and MBE and scores the MBE. It also calculates the scaled written scores for the jurisdictions, serves as a repository for UBE scores, performs UBE score transfers and serves as the coordinating body for UBE administrative polices agreed upon by the jurisdictions.

Ms. Gundersen addressed inquiries regarding whether UBE jurisdictions may allow applicants to appeal their bar exam results. She indicates that the rule for all UBE jurisdictions is once scores are released, unless there is a mistake, there is no appeals process. For purposes of portability, an applicant's UBE score is the score that is released. If a state wants to allow post-release appeals for purposes of its own administration and admit an applicant, it may do so, but it does not affect the portable UBE score.

When a UBE jurisdiction, conducts a pre-release review, any adjustments will result in changes to the UBE scores. Pre-release appeals, however, require that you go back and rescale prior to the release of the scores. Also, if a state does a pre-release review, it is important that it follow the NCBE best practice guidelines.

Chief Justice Shepard asked about what action the NCBE takes when if discovers that a large percentage of test-takers answer a question incorrectly. Ms. Gundersen indicated that in such instances the question will then be subject to a Preliminary Item Analysis (PIA) to determine whether the drafting committee will throw it out.

Study Commission member Cathleen Shrader inquired whether the adoption of the UBE has affected passage rates. Ms. Gundersen contends that any changes in passage rates are not attributable to the adoption of the UBE. She even speculates that when jurisdictions adopt the UBE, the greater attention paid to the test might result in an increase in scores. Study Commission member Jon Laramore observed that if Indiana adopts the UBE, we will be testing a fewer number of topics which might result in a better performance on the exam.

Chief Judge Vaidik inquired about the role of the NCBE. Ms. Gundersen noted that the NCBE was founded in 1931 because of a desire for a national body to assist bar examiners and bar admission administrators across the country. The organization is a non-profit entity consisting of staff of approximately 100 and a board of trustees and committees comprised of examiners and administrators from the various jurisdictions. Over the past several years, the NCBE test development and measurement staff has grown and it now employs 7 full-time psychometricians. In addition to test development and support, the NCBE also conducts character and fitness investigations for a significant number of states and engages in educational and training programs for its members.

Ms. Gundersen next introduced and discussed a series of slides on her PowerPoint presentation about the NCBE's test development process. NCBE's test drafting committees are comprised of professors from over 30 law schools and lawyers and judges from across the country who are subject matter experts. These committees are each staffed by NCBE test editors who are all attorneys. External professors and practitioners review MBE questions for validity and fairness and MEE and MPT questions are reviewed by jurisdictions before they are used. All exam questions (multiple choice and written questions) are pretested before use. The test items for all NCBE exams go through multiple stages of drafting, review and revision by the subject matter experts and generally take three years to develop from start to finish.

The NCBE also has stringent procedures and checks in place to guard against and prevent bias. All test items are checked for bias and MBE items are specifically checked for Different Item Functions (DIF) after pretest administrations. Every drafting committee is diverse and test editors and drafters are trained to spot potential bias in items. MCQ items' players are given action names like buyer, seller, defendant, plaintiff, police officer, etc. Test forms are checked for female v. male actors.

NCBE is partnering with CLEO to provide opportunity for all students to have success on the bar exam. It is also working closely with the academic support staff at law schools. In addition, it has developed a new learning management system called BarNow™, a platform that students can use to study for the bar exam at an affordable price ($250).

The NCBE also hosts grading workshops and provides support for graders. It drafts detailed MEE and MPT grading materials with point allocations. Jurisdictions are responsible for grading the MPT and MEE answers, but must follow NCBE grading rubrics and guidelines to ensure consistent grading across all UBE jurisdictions. Grading workshops are held the weekend after the bar exam and graders may participate in one of three ways: In-person; Live Webinar; or On-demand streaming.

Ms. Gundersen asserts that students, law schools and the legal profession in general all benefit from the UBE. Students benefit from the UBE because it maximizes job opportunities, reduces the actual costs and opportunity costs of preparing for and taking the bar exam in multiple states, and increases the consistency in subjects tested on the bar exam across jurisdictions.

According to Ms. Gundersen, law schools benefit from the UBE because it affords their students more employment options, bar preparation is simplified without multiple exams to study for, study aids are available at a very low cost and high-quality exam questions an grading materials are being made available.

She also asserts that the legal profession benefits from the UBE because it acknowledges a shared core of legal knowledge and lawyering skills, assures a high-quality, uniform system of assessing minimum competence and recognizes the reality of multi-jurisdictional and cross-border law practices.

To transfer UBE scores to seek admission in another jurisdiction, an applicant must: (1) submit the required application forms and fees to the jurisdiction; (2) submit a request to the NCBE for an official UBE transcript to be sent to the jurisdiction; (3) satisfy the jurisdiction's character and fitness requirements; and, (4) successfully complete any state-specific law component. In 2018, there were 28,292 UBE scores earned with 4,989 scores transferred. Since the UBE was first inaugurated, there have been a total of 110,809 UBE scores earned and 16,307 scores transferred. The maximum age of transferred UBE scores that a jurisdiction will accept varies from two years to five years, with about half of the states accepting transfers for up to three years from the date of the test.

Of the 36 jurisdictions that have adopted the UBE a total of 28, or 80%, have cut scores between 260 and 270. At least three states lowered their cut scores and at least one jurisdiction raised its cut score when they adopted the UBE.

UBE jurisdictions may require completion of a local state specific component—a course, test or some combination of the two—that is separate from the bar exam. Completion of the state-specific component may be required before admission or within a prescribed period after admission. Ms. Gundersen indicated that about one-half of jurisdictions have adopted a jurisdiction-specific component that all applicants must complete. She emphasized that development and the maintenance of a local component can be a lot of work. For example, Massachusetts has assembled a team of 19 law professors to help with its local component.

Ms. Gundersen discussed what she described as some typical UBE misconceptions. She asserts that these include the misconception that applicants can somehow "game" the system by sitting in a jurisdiction with lenient graders. Similarly, she contends that there is no indication that UBE causes pass rates to decline or increase.

She also provided the Study Commission members with an overview of the NCBE Testing Task Force that is looking at how the bar exam of the future should be structured. The task force is a project consisting of three phases. It is currently wrapping up phase one—listening sessions with stakeholders, including the jurisdictions, law schools, bar associations, students—and will soon be moving into phase two, which will be a practice analysis.

Ms. Gundersen indicated some of the questions that ultimately must be addressed in looking at the "bar exam of the future" include: (1) whether the timing of the exam should be changed; (2) should more skills and less pure legal knowledge be tested; (3) whether there should be

simulations on the exam; (4) should the exam be open book; and. (5) will there be changes in the test platform and delivery system.

Dean Andrew Klein noted that reliability and validity are two pillars upon which the exam is based. He then asked Ms. Gundersen whether there is anything scientific the NCBE is doing to determine validity as it relates to minimum competence. Ms. Gundersen acknowledged that an exam must be both reliable and valid. She indicated that the NCBE has launched a practice analysis and validity study as part of the testing task force that will be looking at what newly licensed lawyer do and what do they need to know to be deemed minimally competent.

3. Next Meeting

The following speakers are scheduled for the next meeting of the Study Commission on July 11, 2019 in the Indiana Supreme Court Conference Room:

Marsha Griggs
Associate Professor of Law and Director of
Academic Support and Bar Passage
Washburn University School of Law

Roger Bolus, Ph.D.
Senior Partner
Research Solutions Group
(Appearing via Skype)

4. Adjournment

The meeting adjourned at 3:58 p.m.

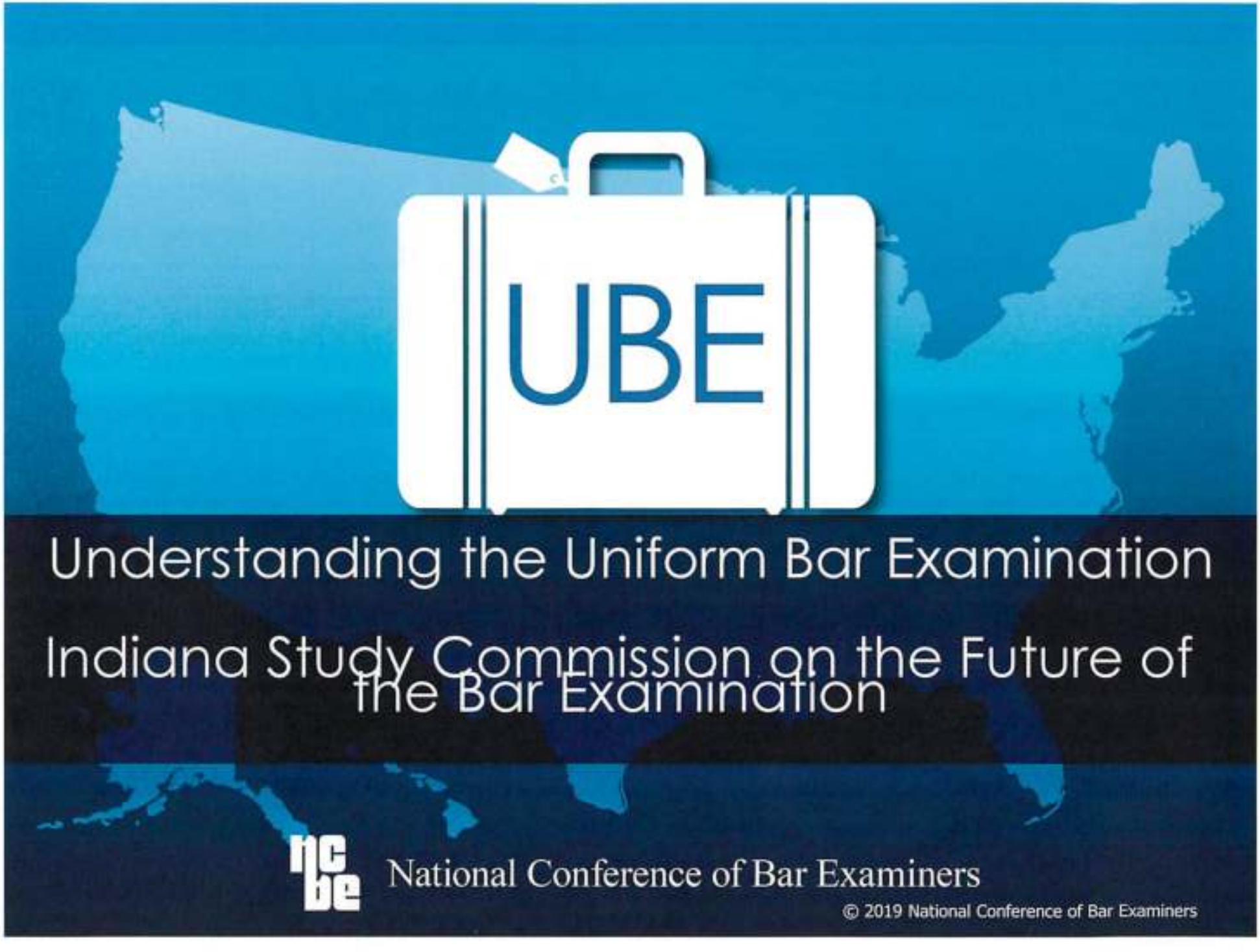
UBE
Understanding the Uniform Bar Examination
Indiana Study Commission on the Future of the Bar Examination
ncbe
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Exhibit A

HIGH-STAKES TESTING FUNDAMENTALS

Reliability, Validity, and Fairness to All Examinees

Bar Exam Fundamentals

- Protection of the public is the key function of the bar exam—identifying those who are minimally competent for entry-level practice.

- Also important is cost and practicality.

Bar Exam Fundamentals

- Exam must be the same (without using the same questions) from one administration to the next to be fair to examinees.

- Test development and scoring must take this notion of test consistency and fairness into account.

THE UNIFORM BAR EXAM

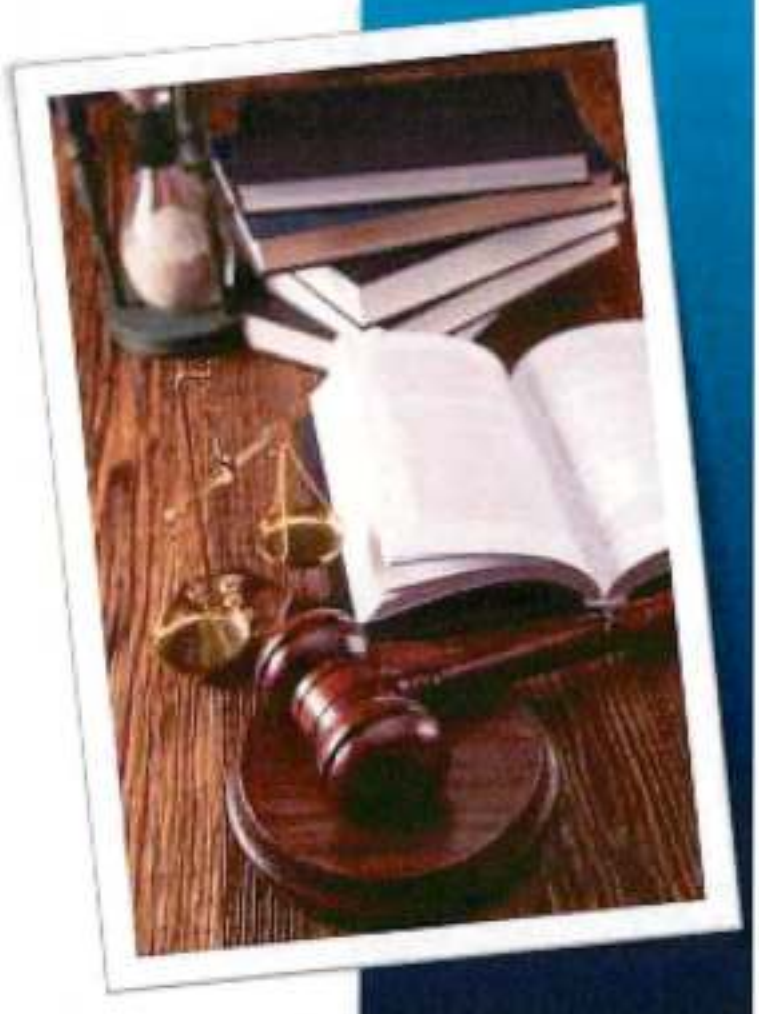
What It Is, Who Uses It, Test Development, and Bias Review

What Is the UBE?

- It is a uniformly administered, graded, and scored bar examination that results in a portable score, not a portable status.
- Applicants who take the UBE may transfer their scores to seek admission in other UBE jurisdictions within a certain amount of time after the scores were earned.

Purpose of the UBE

The UBE tests knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills to determine readiness to enter legal practice in any jurisdiction.



Jurisdictions that have Adopted the UBE

(as of May 10, 2019)*

*Illinois and Maryland will begin administering the UBE in July 2019. Ohio will begin administering the UBE in July 2020. Texas will begin administering the UBE in February 2021. Arkansas will begin administering the UBE in February 2020.

UBE Test Components

Multistate Performance Test (MPT)

Two 90-minute items (3 hours)

Content: a simulated case file presented in a realistic setting and calling for the test candidate to demonstrate fundamental lawyering skills regardless of the area of law in which the task arises

Multistate Essay Examination (MEE)

A common set of six 30-minute essays (3 hours)

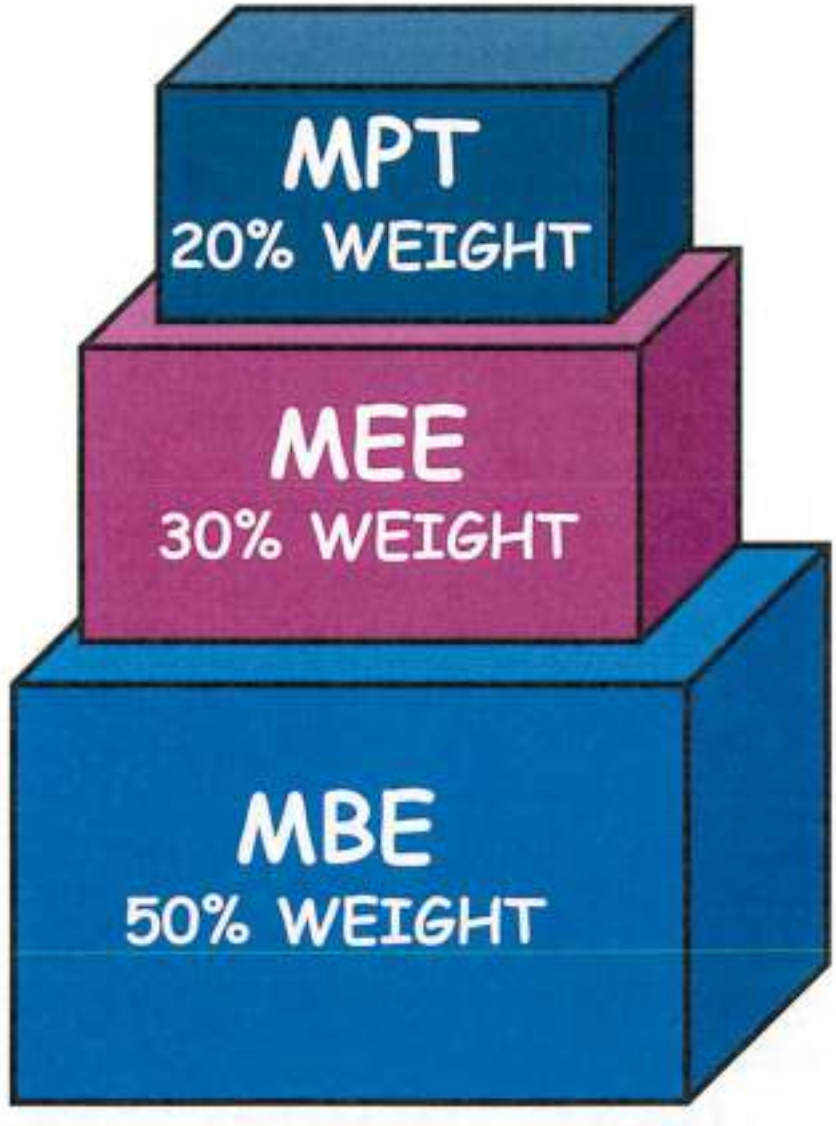
Subjects: the 7 MBE topics plus Business Associations, Conflict of Laws, Family Law, UCC Art. 9 (Secured Transactions), and Trusts & Estates

Multistate Bar Examination (MBE)

200-question, multiple-choice exam (6 hours)

Subjects: Contracts, Constitutional Law, Criminal Law and Procedure, Evidence, Real Property, Torts, and Civil Procedure

Weighting of UBE Components



Scoring and Weighting

- MBE weighted 50% to ensure reliability.
- Written portion weighted 50%.
- Essays and MPTs count 50%; scaling to the MBE does not diminish their importance.
- Equating is the statistical process by which test scores are adjusted across administrations and test forms to ensure that each exam's scores are comparable to scores earned on previous exams.

IRT scaling theory and formula:

https://thebarexaminer.org/wp-content/uploads/PDFs/BE-Sept2015-TheTestingColumn.pdf

Scoring and Weighting of Indiana Exam

- MBE weighted 50%
- MPT weighted 20%
- Indiana Essay Exam Weighted 30%
- Cut score is a 264 on UBE Scale

UBE Subjects Tested

For the scope of coverage of subjects tested, see these outlines on the NCBE website:

- MBE Subject Matter Outline
- MEE Subject Matter Outline
- MPT Skills Tested

INDIANA ESSAY EXAM TOPICS	MULTISTATE ESSAY EXAM TOPICS
Administrative Law	Business Association (AGC, P-Ship, LLCs, COR)
Business Organizations	Conflict of Laws (Embedded)
Family Law	Contracts (including Art. 2)
Federal and State Personal Income Tax, Corporate Tax, Estate and Gift Tax	Criminal Law and Procedure
Indiana Constitutional Law	Evidence
Indiana Employment Law, Including Wage Payment and Wage Claim Statutes	Family Law
Indiana Debt Collection, Including Garnishment, Attachment, and Bankruptcy Exemptions	Federal Civil Procedure
Residential Landlord-Tenant Law	Federal Constitutional Law
Pleading and Practice, Including Statutes of Limitation and the Indiana Tort Claims Act	Real Property
Secured Transactions	Secured Transactions
Wills, Trusts and Estates	Torts
	Trusts and Estates

UBE Test Day Schedules

Tuesday Sessions

- MPT (2 items, 3 hours) IN morning
- MEE (6 essays, 3 hours)IN afternoon

Wednesday Sessions

- MBE (100 questions, 3 hours)
- MBE (100 questions, 3 hours)

Role of UBE Jurisdictions

- Establish requirements for admission
- Set passing scores
- Administer the UBE
- Grade the MEE and MPT
- Set maximum age for transferred UBE scores
- Make character and fitness decisions
- Make testing accommodations decisions
- If deemed necessary, develop and administer separate jurisdiction-specific law component

Role of UBE Jurisdictions

- UBE Policy Committee
- Stakeholder review by MEE/MPT Committee one year prior to administration of exam to provide feedback to MEE and MPT Drafting Committees
- UBE jurisdictions review MEEs and abbreviated analyses four months before administration
- UBE jurisdictions review abbreviated MPTs and point sheets (grading materials) four months prior to administration

Role of NCBE in the UBE

- Develops the MEE, MPT, and MBE
- Scores the MBE
- Calculates scaled written scores (MEE and MPT) for jurisdictions
- Serves as the central repository for UBE scores
- Performs all UBE score transfers
- Serves as coordinating body for UBE administrative policies agreed upon by the jurisdictions

NCBE Uses Highest Quality Test Development and Scoring Practices

- Teams of volunteer content-expert drafters, lawyer test editors, external reviewers, and measurement scientists work on each question and each test form.
- Exam is standardized—MBE scores are equated, and the written portion is scaled to the MBE scaled score distribution.

Test Development Process

- NCBE's drafting committees are composed of professors from 30+ law schools and lawyers and judges from around the country who are experts in the subjects.
- Committees are staffed by NCBE test editors who are also lawyers.
- External professors and practitioners review MBE questions for validity and fairness.
- All questions are pretested before use.
- Jurisdictions review MEE and MPT before use.

Test Development and Production

The test items (questions) for all four of our tests go through multiple stages of drafting, review, and revision by practicing attorneys, judges, law school faculty members, and NCBE's attorney editors. New items are also slated for pretesting.

Note: The timeline below is approximate and may vary between tests.

Test items are developed by the 63 members of NCBE's 10 drafting committees with the support of NCBE's attorney editors.

At least 10 people—drafters, external reviewers, and NCBE staff members—review each new test item multiple times.

3 years before the exam

Drafting committee members **write items** following NCBE's research-based guidelines.

The full drafting committee and attorney editors **review the items.**

Two **external reviewers check the revised items** for content, bias, difficulty, clarity, and relevance.

Recently licensed attorneys **pretest MEE and MPT items.**

Test Development and Production

8 to 18 months before the exam

Drafting committee chairs and attorney editors **select scored items** for use on a new test form.

Drafting committee chairs and attorney editors **select MBE and MPRE items to be placed as unscored pretest items** on a new test form.

2 to 20 months before the exam

The full drafting committee **reviews the new test form** at least twice.

MEE and MPT test forms receive two stakeholder levels of review by the MEE/MPT Policy Committee and user jurisdictions.

NCBE test production staff members **prepare and review test booklets as well as nonstandard materials** for examinees granted testing accommodations under the Americans with Disabilities Act.

NCBE test production staff members perform a **final quality-control check** on printed test booklets and nonstandard materials.

3 to 4 weeks before the exam

Printed test booklets and nonstandard materials are **shipped.**

Exams are administered.

NCBE Bias Checks

- All items are pretested before administration.
- All items are checked for bias.
- All MBE and MPRE items are checked for DIF after pretest administration.
- Every drafting committee is diverse.
- Test editors and drafters are trained to spot potential bias in items.
- MCQ items' players are given action names, like buyer, seller, defendant, plaintiff, police officer, etc.
- Test forms are checked for female v. male actors.

Grader Training

- NCBE drafts detailed MEE and MPT grading materials with point allocations.
- Jurisdictions are responsible for grading their own papers but must follow NCBE grading rubrics to ensure consistent grading across UBE jurisdictions.

GRADING WORKSHOP

MADISON, WISCONSIN

- NCBE hosts Grading Workshop in Madison the weekend after the bar exam.
- Graders participate in one of three ways:
  - In-person (Live)
  - Webinar (Live)
  - On-demand streaming (Recorded)

GRADING WORKSHOP
MADISON, WISCONSIN

- Each MEE question and MPT item has its own dedicated hands-on grading session of real examinee answers from jurisdictions.
- Sessions led by MEE and MPT drafters and experienced Workshop facilitators.
- NCBE offers grading support after exam.
- NCBE surveys all graders six weeks after exam to learn how items are grading.

GRADING WORKSHOP
MADISON, WISCONSIN

- In-person and webinar graders have input on grading weights.
- Our goal at Workshop is to familiarize graders with answers they'll see when they grade their own papers and to discuss and refine grading weights and identify grading issues.
- We seek to ensure grading consistency and achieve a good spread over the entire score scale.
- Jurisdictions free to use their own score scale.

Students Benefit from UBE

- increases consistency in subjects tested on the bar exam across jurisdictions
- maximizes job opportunities—UBE scores that are failing in the testing jurisdiction are transferable to UBE jurisdictions that have a lower passing score requirement
- reduces actual costs and opportunity costs of preparing for and taking the bar exam in multiple jurisdictions

Law Schools Benefit from UBE

- Students have more employment options
- Bar preparation is simplified without multiple bar exams for which to help students study
- High quality exam questions and detailed grading materials
- Study aids available at very low cost, some for free
- New LMS called BarNow™

Profession Benefits from UBE

- acknowledges a shared core of legal knowledge and lawyering skills
- assures a high-quality, uniform system of assessment of minimum competence
- recognizes the reality of multi-jurisdictional or cross-border practice

THE UNIFORM BAR EXAM

Score Transfers, Cut Scores, Local Component

Admission by Transferred Score

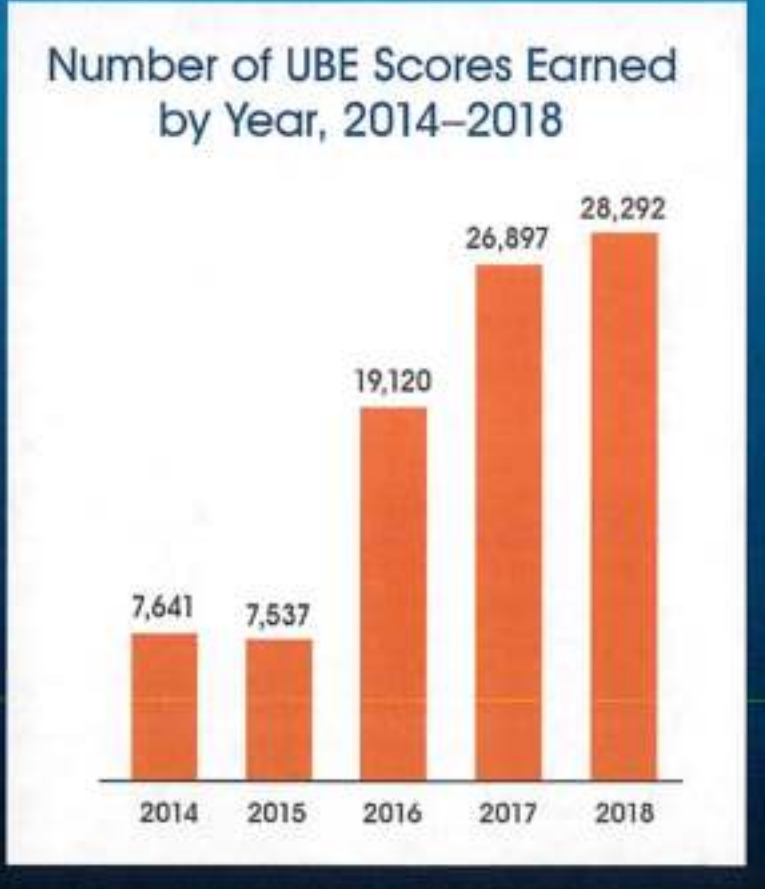
To transfer UBE scores to seek admission in another UBE jurisdiction, applicants must:

- submit the prescribed application forms and fee to the jurisdiction;
- submit a request to NCBE for an official UBE transcript to be sent to the jurisdiction (see UBE Score Services);
- satisfy the jurisdiction's character and fitness and other admission requirements; and
- complete jurisdiction-specific law component(s), if required.

UBE Scores Earned & Transferred 2018

UBE Scores Earned & Transferred

Through June 6, 2019



Minimum Passing UBE Scores

260
Alabama
Minnesota
Missouri
New Mexico
North Dakota

266
Connecticut
District of Columbia
Illinois
Iowa
Kansas
Maryland
Montana
New Jersey
New York
South Carolina
Virgin Islands

270
Arkansas
Massachusetts
Nebraska
New Hampshire
North Carolina
Tennessee
Utah
Vermont
Washington
West Virginia
Wyoming

272
Idaho

273
Arizona

274
Oregon

276
Colorado
Maine
Rhode Island

280
Alaska

* The minimum passing UBE scores in Ohio and Texas have not yet been announced.

A score that does not meet the minimum passing score in the testing jurisdiction may be portable to another jurisdiction if the score is at or above the level required in the receiving jurisdiction.

UBE Cut Scores

Of the 36 jurisdictions that have adopted:

- 28 are between a 260-270 = 80%
- At least three have lowered cut scores (OR, MT, ID, NC)
- At least one has raised its cut score (CT)
- Cut Score info:
  - https://thebarexaminer.org/article/fall-2018/standard-setting-101-background-and-basics-for-the-bar-admissions-community/
  - https://thebarexaminer.org/wp-content/uploads/PDFs/860217-BE-TestingColumn.pdf

Maximum Age of Transferred UBE Scores

2 years
North Dakota
Rhode Island

2 years/ 5 years
Iowa
Utah

25 months
Alabama

3 years
Arkansas
Connecticut
Kansas
Maine
Maryland
Massachusetts
Minnesota
Montana
Nebraska
New Jersey
New Mexico
New York
North Carolina
Oregon
South Carolina
Virgin Islands
West Virginia
Wyoming

3 years/ 5 years
Colorado
New Hampshire
Tennessee
Vermont

37 months
Idaho

40 months
Washington

4 years
Illinois

5 years
Alaska
Arizona
District of Columbia
Missouri
Ohio

The minimum age of transferred UBE scores in Texas has not yet been announced

*Some jurisdictions describe the maximum age in months instead of years. For the purpose of this slide, if months and years are an equal amount of time, the maximum age is stated in years.

Jurisdiction-Specific Law

- UBE jurisdictions may require completion of a course, test, or some combination of the two that is separate from the UBE.
- Completion may be required before admission or within a prescribed period after admission.
- If required, jurisdiction-specific components typically must be completed by all applicants whether they are testing locally or transferring in UBE scores.

Jurisdiction-Specific Law Components Required

Pre-admission:*

- **Live course:** Montana, New Mexico
- **Online course:** Alabama, Arizona, New York, North Carolina, South Carolina, Tennessee
- **Online open-book multiple-choice test:** Massachusetts, Missouri, New York, Virgin Islands, Washington

Post-admission course or mentorship:* District of Columbia, Idaho, New Hampshire, New Jersey, Oregon, Utah, Vermont, West Virginia

* The nature of the component that will be required in Maryland (pre-admission) has not yet been announced.

UBE Jurisdiction-specific Law Component Requirements

No component:
Alaska, Arkansas, Colorado, Connecticut, Illinois, Iowa, Kansas, Maine, Minnesota, Nebraska, North Dakota, Rhode Island, Wyoming

Pre-admission component:
Alabama, Arizona, Maryland, Massachusetts, Missouri, Montana, New Mexico, New York, North Carolina, South Carolina, Tennessee, Virgin Islands, Washington

Post-admission component:
District of Columbia, Idaho, New Hampshire, New Jersey, Oregon, Utah, Vermont, West Virginia

* Ohio and Texas have not yet announced whether they will require a jurisdiction-specific law component.

Some UBE Misconceptions

- Examinees can "game" the system by sitting in a jurisdiction with lenient graders.
- The UBE causes pass rates to improve (or decline).
- NCBE decides on the UBE rules of the game.

THE UNIFORM BAR EXAM

Final Thoughts and The Future of the Bar Exam

NCBE's Testing Task Force

- Looking at the bar exam of the future.
- Three phases—currently finishing up phase one—listening sessions—and we are about to launch a practice analysis for phase two.
- We have held multiple listening sessions with bar examiners, admissions staff and justices.
- See handout.

Bar Exam of the Future?

- Timing of exam?
- More skills/less knowledge?
- Simulations?
- Different test platform/delivery system?
- Open book?
- How to test "other personal characteristics" like collegiality, grit, and conscientiousness?
- Must remain a consistently graded, fair exam.

Thank You

The Testing Column: Q&A: NCBE Testing and Research Department Staff Members Answer Your Questions

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NCBE Testing and Research Department Staff:
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Back row: **Mengyao Zhang, Ph.D.; Andrew A. Mroch, Ph.D.; Mark Connally, Ph.D.; Douglas R. Ripkey, M.S.**

1 What Is Equating? Why Do It? How Does It Work?

Equating is a statistical procedure used for most large-scale standardized tests to adjust examinee scores to compensate for differences in difficulty among test forms so that scores on the forms have the same meaning and are directly comparable. (The term *test form* refers to a particular set of test items, or questions, administered at a given time. The February 2017 Multistate Bar Examination [MBE] test form, for example, contains a unique set of items, and the July 2017 test form contains a different set of items.) With equating, a reported scaled score has a consistent interpretation across test forms.

Equating is necessary because using exactly the same set of items on each test form could compromise the meaning of scores and lead to unfairness for some examinees. For example, there would be no guarantee that items were not shared among examinees over time, which would degrade the meaning of scores. Not only would the scores obtained by some examinees be corrupted by the examinees' advance knowledge of test items, but, if undetected, these inflated scores would advantage the clued-in examinees over other examinees. To avoid this problem, the collection of items on test forms for most large-scale standardized tests changes with every test administration.

Despite test developers' best efforts to build new forms that conform to the same content and statistical specifications over time, it is nearly impossible to ensure that statistical characteristics like difficulty will be identical across the forms. Equating adjusts scores for such differences in difficulty among test forms so that no examinee is unfairly advantaged by being assigned an easier form or is unfairly disadvantaged by being assigned a more difficult form.

While there are many methods available to conduct equating, a commonly used approach for equating large-scale standardized tests—and the approach that is used for the MBE—is to embed a subset of previously administered items that serve as a "mini-test," with the items chosen to represent as closely as possible the content and statistical characteristics of the overall examination. The items that compose this mini-test are referred to as *equators*. The statistical characteristics of the equators from previous administrations are used to adjust scores for differences in difficulty between the current test form and previous forms after accounting for differences between current and previous examinee performance on the equator items.[1] Conceptually, if current examinees perform better on the equators compared to previous examinees, we know that current examinee proficiency is higher than that of previous examinees and that current examinees' MBE scaled scores should be higher (as a group) than those of previous examinees (and vice versa if performance on the equators is worse for current examinees). The equators are used as a link to previous MBE administrations and, ultimately, to MBE scaled scores.

2 Can We Equate Essay or Performance Tests? (Or, What Is Essay Scaling?)

As with MBE items, the written components of the bar exam (essay questions and performance test items) change with every administration. The difficulty of the questions/items, the proficiency of the group of examinees taking the exam, and the graders (and the stringency with which they grade) may also change. All three of these variables can affect the grades assigned by graders to examinees' responses to these written components of the exam and can have the potential to cause variation in the level of performance the grades represent across administrations. Unlike the MBE, the answers to the written questions/items of the bar examination cannot be equated, because previously used questions/items can't be reused or embedded in a current exam—there are too few written questions/items on the exam and they are too memorable. If essay questions or performance test items were reused, any examinee who had seen them on a previous administration would be very likely to have an unfair advantage over examinees who had not seen them previously.

Because directly equating the written components is not possible, most jurisdictions use an indirect process referred to as *scaling the written component to the MBE*. This process has graders assign grades to each question/item using the grading scale employed in their particular jurisdiction (e.g., 1 to 6). The individual grades on each written question/item are typically combined into a raw written score for each examinee. These raw written scores are then statistically adjusted so that collectively they have the same mean and standard deviation as do the scaled scores on the MBE in the jurisdiction. (*Standard deviation* is the measure of the

spread of scores—that is, the average deviation of scores from the mean. The term *scaled score* refers to the score as it has been applied to the scale used for the test—in the case of the MBE, the 200-point MBE scale.)

Conceptually, this process is similar to listing MBE scaled scores in order from best to worst and then listing raw written scores in order from best to worst to generate a rank-ordering of MBE scores and written scores. The best written score assumes the value of the best MBE score; the second-best written score is set to the second-best MBE score, and so on. Functionally, the process yields a distribution of scaled written scores that is the same as the jurisdiction's distribution of the equated MBE scaled scores. Another way to think about the process is that the raw written scores are used to measure how far each examinee's written performance is from the group's average written performance, and then the information from the distribution of the group's MBE scores is used to determine what "scaled" values should be associated with those distances from the average.

This conversion process leaves intact the important rank-ordering decisions made by graders, and it adjusts them so that they align with the MBE scaled score distribution. Because the MBE scaled scores have been equated, converting the written scores to the MBE scale takes advantage of the MBE equating process to indirectly equate the written scores. The justification for scaling the written scores to the MBE has been anchored on the facts that the content and concepts assessed on the MBE and written components are aligned and performance on the MBE and the written components is strongly correlated. The added benefit of having scores of both the MBE and the written component on the same score scale is that it simplifies combining the two when calculating the total bar examination score. In the end, the result of scaling (like equating) is that the scores represent the same level of performance regardless of the administration in which they were earned.

3 How Does Grader Leniency Affect a Jurisdiction's Pass Rate?

For jurisdictions that scale their written components to the MBE (as recommended by NCBE), grader leniency does not affect a jurisdiction's overall pass rate.[2] Because grades on individual written items are combined to create a raw written score that is then scaled to the MBE, grader leniency (or stringency) is accounted for, thereby not affecting the jurisdiction's overall pass rate.[3] Grades rank-order examinees, but pass rate is determined by the jurisdiction's cut score and the MBE scores for the group of examinees in a jurisdiction.

For example, if the mean raw written score in a jurisdiction is 50% of the points and the mean MBE score is 142, then the 50% will be converted to a 142 when the written component is scaled to the MBE. If graders are more lenient and the mean raw written score is 70% of the points, and assuming that the mean MBE score remains 142, the 70% will be converted to a 142 when the written component is scaled to the MBE.

While grader leniency (or stringency) does not affect a jurisdiction's overall pass rate, it could affect which examinees pass or fail. For example, suppose that two graders are assigned to grade the same essay question, and that one grader is lenient and the other is harsh (which would result from the graders not being properly calibrated). Further, suppose that the essays provided to the

two graders are of equal quality. The essays evaluated by the harsh grader will receive lower scores and would be more likely to result in failure than those evaluated by the lenient grader, even though the overall pass rate remained the same. Failure to adequately calibrate graders is of consequence to individual examinees even though the overall passing rate for the jurisdiction is unaffected.

Jurisdictions should help ensure that examinee grades accurately reflect performance on each question by verifying that graders are properly calibrated and that they are using the entire available grading scale for each essay.[4]

4 If a Jurisdiction Changes the Weights of the Bar Exam Components, Will the Pass Rate Change?

If a jurisdiction scales its written component to the MBE, changing the weights of the MBE and the overall written component when calculating the total bar examination score (e.g., weighting the MBE 40% vs. 50% in relation to the written component) will not have a large impact on the pass rate for a given administration. Because scaling places the performance on the written component on the same (equated) score scale as the MBE, the means and standard deviations will be identical and how scores are distributed will usually be very similar. When two distributions with a similar shape (i.e., the same means and standard deviations) are combined (i.e., added together or averaged), the shape of the resulting distribution of scores will also be similar.

For example, if a jurisdiction's average MBE score is 140, the average written component score will also be 140 after the written component is scaled to the MBE. When those average scores are added together, the combined score will not vary based on the weight assigned to each component. The following examples illustrate that the group's average for the combined score is 140 regardless of whether the MBE is weighted 40% or 50% of the combined score.

MBE weighted 40% (40-60 weight):
$(0.40 \times 140) + (0.60 \times 140) =$ **140**

(weight of 40% times the average MBE score plus weight of 60% times the average written component score)

MBE weighted 50% (50-50 weight):
$(0.50 \times 140) + (0.50 \times 140) =$ **140**

(weight of 50% times the average MBE score plus weight of 50% times the average written component score)

Note that to calculate the combined score for an individual examinee, the examinee's scores would be substituted for the group average scores in the equations shown above. As a result, an individual examinee's combined score will be affected by the weighting, but the overall average score for the jurisdiction and the overall pass rate for the jurisdiction won't change much. Examinees whose score is higher on the component with the greater weight will be more likely to pass the exam. For example, suppose an examinee received a score of 140 on the MBE and a

score of 130 on the scaled written component. With the 40-60 weighting, the examinee's combined score would be 134, whereas it would be 135 with the 50-50 weighting. The result is that if the cut score was 135 in a jurisdiction, the examinee would fail by the 40-60 weighting and pass by the 50-50 weighting, yet the percentage passing in the jurisdiction would be essentially the same under both weighting approaches.

5 Is the MBE (Only) a Test of Memorization?

Two content validity studies, conducted in 1980 and 1993, invited law practitioners and professors to evaluate (among other things) the extent to which MBE items placed greater emphasis on memorization or on analytic skills. Across those studies, subject matter experts indicated that the items placed roughly equal emphasis on memorization and legal reasoning skills across content areas—with the exception of Constitutional Law, where the panelists reported greater emphasis on reasoning skills.[5]

More recently, in research conducted by a recipient of NCBE's Covington Award,[6] think-aloud protocols were used to measure the cognitive processes examinees used in responding to MBE items. (Think-aloud protocols involve having participants verbalize their thoughts as they perform a given task, thereby providing insight into the cognitive processes involved in performing the task.) The results revealed that efforts to recall isolated facts were a relatively small proportion of the cognitive processes examinees engaged in when responding to MBE items.[7]

In addition, correlational research has indicated that MBE scores are related to other measures of legal reasoning ability, including the written portion of the bar examination,[8] law school grades,[9] and simulations of tasks such as questioning witnesses, negotiating a settlement, and preparing a brief.[10]This correlational research indicates that regardless of the degree to which the MBE requires memorization, performance on the MBE is indeed associated with important legal skills.

Finally, NCBE's former president, Erica Moeser, was unequivocal in stating that requiring examinees to have working knowledge of and fluency in legal concepts is not an undue burden but a central part of ensuring fitness for practice:

One bit of rhetoric I have encountered lately seems to take issue with the MBE as a test of memory. For starters, that is not an apt characterization. We know that the MBE tests analysis and reasoning. There is a kernel of truth in the testing of memory, though, and that is an acknowledgment that the MBE does require knowledge that must be remembered when taking the test.

For me, there is no defensible argument that emergence from law school should occur without assurance that the graduate has acquired the knowledge required for entering the practice of law. While skills and values are certainly essentials, anyone who makes the case that baseline knowledge is not an essential for practice and not appropriate for testing has got it all wrong.

The knock on memorization falters if it is a euphemism for excusing knowledge as an essential, or if it serves as an excuse for institutional or individual failure to acquire fundamental knowledge about the core subject matter that belongs at the threshold of a lifetime general license to practice law.[11]

6 How Do We Know That the Change from 190 to 175 Scored Items on the MBE Didn't Hurt Scores?

Effective with the February 2017 bar examination, NCBE increased the number of pretest items on the MBE from 10 to 25, thereby reducing the number of live items from 190 to 175. (The unscored pretest items are questions whose performance will be evaluated for use on a future exam, and live items are those that contribute to an examinee's score.) A common concern with regard to the reduction from 190 to 175 scored items on the MBE is whether this change would make it harder to get a high score and pass the bar exam, as the scaled scores are now based upon 15 fewer items.

Scaled scores on the MBE are not constricted by having fewer items. The 190 or 175 raw score points will map to the same 200-point MBE scale. More importantly, by reducing the number of scored items, we were able to pretest 15 additional new or revised items per exam booklet while maintaining the same total test length of 200 items and the same testing time. The pretest data provides us with important information concerning item performance, which facilitates construction of future MBE forms built more closely to statistical specifications.

Before implementing a change in the number of scored items, we modeled the impact of the reduction in the number of scored items using the MBE exams administered in 2015 and 2016. We found minimal effects on the MBE 200-point scaled scores. The scaled score mean and standard deviation were only affected at the second decimal point, indicating that overall performance was not affected by a reduction to 175 scored items.

The consistency with which examinees would pass or fail with a passing score of 135 on the MBE (the most commonly used passing score across the jurisdictions) was very high between the 190- and 175-item exams.

We also modeled the expected impact on the reliability of scores in 2015 and 2016 (reliability being the extent to which a group of examinees would be rank-ordered in the same way over multiple testing sessions) and found that we should expect no change or maybe even a slight increase. The reduction in the number of scored items would be offset by an ability to select - better-functioning items because of the added pretest data and an ability to be more selective because of the need for fewer items. This finding has been confirmed by both the February 2017 and July 2017 MBE administrations, when the reliability of scores either rose or tied the highest value achieved previously, in spite of being based upon fewer items.

7 Is the MBE Getting Harder? Easier?

When new MBE items are written and go through the extensive review and revision process required for any MBE item, the judgments of the content experts drafting the items (law

professors, practicing lawyers, and judges)—as well as the judgments of outside content experts who conduct an additional review on each item—provide content-related evidence that each item is appropriately targeted to be a prerequisite for the newly licensed lawyer. However, before allowing an item to count toward any examinee's score, NCBE prefers to try out the item by including it on an exam as an unscored pretest item (that is, an item that does not count toward an examinee's score). Pretesting provides verification that each item has acceptable statistical characteristics—for example, that it is not so difficult that only a small number of examinees answer it correctly. While the pretest items do not count toward an examinee's score, gathering statistical information from pretest items helps to build future exams with the best and most stable statistical characteristics.

Each set of items comprising an MBE (i.e., each test form) is built to the same content and statistical specifications to be as consistent as possible over time. However, it is very challenging to build test forms that are of identical difficulty when the collection of questions changes across test forms. Some test forms may be easier and some may be more difficult. This is where the statistical process of equating is used to address any differences in difficulty. Because scaled scores are equated, an examinee receiving an easier test will not be unfairly advantaged and an examinee receiving a more difficult test will not be unfairly disadvantaged in the MBE scaled score each examinee receives. The MBE scaled scores maintain consistent meaning across test forms so that scores reflect consistent levels of performance. The MBE is not getting harder or easier.

Notes

1. For more detailed descriptions and examples of equating, *see* Mark A. Albanese, Ph.D., "The Testing Column: Equating the MBE," 84(3) *The Bar Examiner* (September 2015) 29–36; Deborah J. Harris, "Equating the Multistate Bar Examination," 72(3) *The Bar Examiner* (August 2003) 12–18; Michael T. Kane, Ph.D. & Andrew Mroch, "Equating the MBE," 74(3) *The Bar Examiner* (August 2005) 22–27; Michael J. Kolen & Robert L. Brennan, *Test Equating, Scaling, and Linking: Methods and Practices* (Springer 3rd ed. 2014); Lee Schroeder, Ph.D., "Scoring Examinations: Equating and Scaling," 69(1) *The Bar Examiner* (February 2000) 6–9.*(Go back)*

2. For the few jurisdictions that do not scale their written components to the MBE, grader leniency would inflate their pass rates, because a lenient grader (or graders) would lead to higher written scores. Likewise, grader stringency would deflate their pass rates, because a stringent grader (or graders) would lead to lower written scores. Without scaling the written component to the MBE, the degree of stringency or leniency is not accounted for, which will affect the jurisdiction's pass rate.*(Go back)*

3. Susan M. Case, Ph.D., "The Testing Column: Procedure for Grading Essays and Performance Tests," 79(4) *The Bar Examiner* (November 2010) 36–38.*(Go back)*

4. *See* Judith A. Gundersen, "It's All Relative—MEE and MPT Grading, That Is," 85(2) *The Bar Examiner* (June 2016) 37–45.*(Go back)*

5. Stephen P. Klein, *An Evaluation of the Multistate Bar Examination* (National Conference of Bar Examiners 1982); Stephen P. Klein, *Summary of Research on the Multistate Bar Examination* (National Conference of Bar Examiners 1993).*(Go back)*

6. NCBE's Joe E. Covington Award for Research on Testing for Licensure is an annual award intended to provide support for graduate students in any discipline doing research germane to testing and measurement, particularly in a high-stakes licensure setting.*(Go back)*

7. *See* Sarah M. Bonner, Ph.D., "A Think-Aloud Approach to Understanding Performance on the Multistate Bar Examination," 75(1) *The Bar Examiner* (February 2006) 6–15, at 10, category 8, example B).*(Go back)*

8. Mark A. Albanese, Ph.D., "The Testing Column: Let the Games Begin: Jurisdiction-Shopping for Shopaholics (Good Luck with That)," 85(3) *The Bar Examiner* (September 2016) 51–56; Susan M. Case, Ph.D., "The Testing Column: Relationships Among Bar Examination Component Scores: Do They Measure Anything Different?," 77(3) *The Bar Examiner* (August 2008) 31–33.*(Go back)*

9. Klein 1993, *supra* note 5.*(Go back)*

10. Stephen P. Klein, "On Testing: How to Respond to the Critics," 55(1) *The Bar Examiner* (February 1986) 16–24.*(Go back)*

11. Erica Moeser, "President's Page," 86(2) *The Bar Examiner* (June 2017) 4–6, at 5.*(Go back)*

The Testing Column

Equating the MBE

by Mark A. Albanese, Ph.D.

Equating is the most complex process underlying the production of scores for the MBE. Explaining it to people is the quickest way to end a party, yet it is still the topic I am most frequently questioned about. I am not the first NCBE Director of Testing to have experienced this. In fact, this column and other articles in the *Bar Examiner* have addressed the topic of equating several times over the years. They say that doing the same thing over and over again and each time expecting a different outcome is a sign of insanity. The fact that I am writing this article makes me a little worried about myself, but here goes.

The only constant is change. In the high-stakes testing world, we have to change almost everything each time we administer a test. Because the stakes are high for the bar examination, there are any number of examinees who would dearly love to see items on the MBE before the test is administered. Thus, we wait for a few administrations before we reuse any question, or item, and we use any given item for only a few test administrations before we quit using it forever. Against this backdrop, we also have to ensure that a score we produce retains its meaning across time and space. A score earned in 2013 in New York should have the same meaning as a score earned in 2014 in Guam. We rely on standardized administration of the MBE to ensure that where an examinee sits for the exam (space) does not affect his or her score. To ensure that whether an examinee takes the MBE in 2009 or 2015 or July or February (time) is not a factor, we rely upon equating.

Each time NCBE builds an MBE test, we do our best to choose items that will work the same way as items have in the past. The exam is built according to a detailed subject matter blueprint and statistical criteria that ensure comparability of what is measured across time. (One recent update is the addition of Civil Procedure to the February 2015 MBE, which was a change in content that will continue going forward.) However, with so many items and so much content to cover, it is nearly impossible to build a test that has exactly the same level of difficulty as those previously administered. The overall difficulty of an examination will be slightly different each time. Equating is the process of statistically adjusting scores to account for these differences in difficulty.

In this article, I will describe the process we use at NCBE to develop the MBE so that it can be equated, as well as the process we use in scaling and equating the examination. By necessity, my article is an oversimplification of the actual processes we use, but I hope that it will give you a sense of what we do.

Equating Overview

The purpose of equating is to adjust for any change in the difficulty of a newly created examination so

that the exam's scores are comparable to the scores of previous exams. To do this, there must be something about the new exam that remains constant or at least has links to past examinations. There are many ways this can be achieved, but the way we achieve it with the MBE, and an approach that is commonly used in other high-stakes testing programs, is to embed a mini-MBE within each test we administer that consists of previously used items. The items on the mini-MBE are chosen so that they represent as closely as possible the content of the overall examination. The items on the mini-MBE are called the equators, because, as you might guess, they are used to equate the examination. Because the equators have been used previously, we know approximately the percentage of examinees who will answer them correctly (*difficulty*[1]) and how much more likely it is that they will be answered correctly by examinees who do well on the overall test than by those who do not (*discrimination*[2]). This statistical information gives us the ability to link performance on the current examination to previous examinations. If examinees on the current test perform more poorly on the equator items than those who took the examination previously (as was the case in July 2014), we can attribute examinee performance differences on the equators to differences in the examinees themselves, because the equator items are unchanged. We then use a statistical adjustment to make the performance on the rest of the items conform to that of the equator items. I will return to this later to show how this works.

Equator Item Selection

As a set, equators are intended to comprise a mini-exam that is representative of a full MBE from both a subject-area and a statistical perspective. All equators have been used as scored items on at least one previous MBE administration.

Equator sets must satisfy specific psychometric criteria. When selecting an equator set, both within each subject area and as a complete set, various aspects of the potential items are considered, including the following:

1. **Date of most recent use.** Equators are selected from numerous past administrations. One-half of an equator set should have appeared most recently on a February administration, and the other half on a July administration.
2. **Placement from most recent use.** One-half of an equator set should have appeared most recently on a morning test form, and the other half on an afternoon test form. All equators are placed in a position on the test form that is as close as possible to their placement in their most recent use.
3. **Statistics from most recent use.** An equator set should have an average overall difficulty that is representative of the average overall difficulty and discrimination that meets or exceeds specified criteria.
4. **Content representation.** The content assessed by the selected equators within each subject area should be representative of the spread of items within that subject area that will appear on the full exam.

An item selected as an equator is not edited from the version that appeared in its most recent use. This helps to ensure that equators perform as closely as possible to the way they performed previously.

Once equators are selected (see the article by C. Beth Hill on page 23 for more information about this process), psychometric staff members review the set of items for compliance with established statistical criteria. As with most things in life, it is rare that you get to have your cake and eat it too. The same is true in the selection of equators.

Equator selection requires a balance between the desire to meet statistical criteria and the desire for content representation and conforming to item-writing best practices (a combination of avoidance of known flaws in the construction of an item that can affect examinee performance combined with stylistic issues designed to provide clarity and avoid confusion). If necessary, items are replaced with other items that are subject to the same delicate balance of meeting the web of intersecting criteria for content, statistics, and best practices.

Scaling

Scaling is the method by which we assign numbers to something we measure. One of the most commonly encountered examples of different scaling methods is that of temperature, which can be reported on the Fahrenheit or Celsius scale. Both scales are anchored to the freezing and boiling points of water (0 and 100 degrees Celsius, respectively; 32 and 212 degrees Fahrenheit, respectively). The Fahrenheit scale is more finely graded than the Celsius scale because there are 180 integer points between freezing and boiling as opposed to only 100 points on the Celsius scale. Is one better than the other? Not really; it is a matter of preference. The really important thing is not to mix them up. If you think you are jumping into a pool with 100-degree Fahrenheit water, you will be in for an unpleasant surprise if the thermostat is scaled in Celsius.

Typically, scaling in the testing context is designed so that examinees will not think their scaled score is either a number correct or a percent correct. The equating process makes adjustments in scores that can create a fair amount of confusion if examinees think their scaled score is the number correct or the percent correct. One of the goals, then, of scaling is to express scores in such a manner as to avoid that confusion. Therefore, clearly unique score values are typically chosen for a score scale. For example, the Scholastic Aptitude Test (SAT) scaled scores were originally set to have a minimum of 200 and a maximum of 800 with a mean set at 500 and a standard deviation of 100. Scores have migrated upward over the years as test takers have become better prepared, but the interpretation is still based on that original scale. (As a reminder, the mean is the sum of scores divided by the number of scores; the standard deviation can be thought of as the average deviation of scores from the mean, although its exact computation is more complex.)

For better or worse, the MBE scale we report appears to be based on the number of items answered correctly by examinees on the 200-item examination administered in July 1972 (the second-ever administration of the MBE). Even today, after 43 years, the scores from the MBE can be thought to be referenced to that early examination. It is not a direct link, however. Not one item on today's examination or probably any examination since 1980 was on the test administered in 1972. The relationship is through the equatings that have occurred since that time.

Each equating links scores to at least two earlier exams, one or more in July, the other(s) in February. Because all of these exams have been equated to earlier examinations, there is an unbroken chain of linkages back to that 1972 examination. Because the test changes its character over time and the linkages become more fragile as time passes, the base test used to serve as the reference for computing statistics employed in scaling is reset periodically. Our current base is the July 2001 examination. The difference is primarily statistical. Conceptually, the scale still harkens back to the July 1972 examination.

Equating

The driving force in how we equate the MBE is performance on the equator items. We first assess whether what I refer to as the genetic makeup of

our equators has changed. The genetic makeup of an item consists of its discrimination, difficulty, and guessing parameters, as described later. While evolution may have benefited our ancestors, it is not something we want to see in equators. If the genetic makeup of an item has changed, we remove the item from the equating set and treat it like the rest of the items on the test. In any given administration, very few items show evolutionary tendencies such that they have to be removed from the equator item set.

After completing our analysis of the stability of the equators' genetics, we evaluate the equators' performance. If the performance on the equator items in their current administration is lower than in their previous administration, we conclude that the present examinees are not as proficient as the previous examinees. If performance on the equator items is higher, we conclude that the present examinees are more proficient than the previous examinees. We then need to adjust scores on the total set of items to proportionately reflect that conclusion.

The simplest adjustment would be to obtain the difference in average difficulty for the equator items in the current administration versus the previous administration and apply that difference to the items that were non-equators. So, if the average difficulty on the equators was 5% lower in the present administration (the difficulty value expressing the percentage of examinees who answered the items correctly—therefore a 5% lower value indicating that fewer examinees answered the items correctly), then the performance on the other items would also be lower in the present administration, compared with the expected performance had those items been answered by the previous group of examinees. Therefore, we would add 5% to the score on the non-equator items before combining the equator and non-equator scores and referencing the total score to the raw-to-scaled-score conversion chart from the previous administration.[3] (After the equating process for each administration, a raw-to-scaled-score conversion chart is produced to relate the raw scores to scaled scores.)

While adjusting scores on the basis of the average difficulty of the equator items would be the easiest approach, it assumes that the differences in the equator scores project equally for all examinees at all points of the score range. However, that is not how it usually works. Usually the relationship is proportionate to an examinee's score, so lower-performing examinees are affected less than higher-performing examinees. Thus, the mathematical relationship may be better modeled, for example, by assuming that there is a linear relationship between the current and past performances on the equator items and that this relationship then extends to the non-equator items used to compute a score.[4] With a linear approach, it is not just a value like the mean that is added or subtracted from scores, but there is a slope (change in current scores divided by the change in scores from previous use) that scores are multiplied by. The slope that scores get multiplied by and the value that is then added to scores is first derived for the equators and then applied to the rest of the items similar to the process described above for the mean. However, this is just getting you primed for the real thing, because when we adjust MBE scores at NCBE, we do not use either of these approaches, but one based upon Item-Response Theory (IRT).

Item-Response Theory

IRT Background

Prior to the advent and implementation of IRT, the statistics used for test development relied almost exclusively on the two types of item statistics that I introduced earlier: the percentage of examinees who answered an item correctly (difficulty) and how well the item differentiated between examinees who

did well on the overall examination and those who did not (discrimination). The problem with these statistics is that they are dependent upon the examinees used in their computation being comparable to examinees in the future. To the extent that future examinees are not comparable to those for which an item's statistics were obtained, the results for that item will not conform to what is expected (i.e., have the same difficulty relative to the other items, correlate the same with the other items and with the test as a whole, etc.).

For the MBE, this is a particular problem, because the February examinee population is composed of approximately 60% retakers compared to less than 20% in July. Retakers are generally known to perform less well, on average, than first-time takers, and we consistently find that the performance of February MBE takers is lower than that of July MBE takers. When we compare the percent correct for an item that was previously administered in July with its performance when it was previously administered in February, the July percent correct is often 5–10% higher than that obtained in February. IRT has properties that overcome the differences in February and July examinees.

IRT Concepts

The basic concepts of IRT were developed as long ago as the 1950s, but they did not become practical for use in actual tests until the 1980s and 1990s when computing power became adequate to do the required analyses.[3] In a way, you can think of IRT as deciphering an item's DNA, and just as human DNA is sometimes used to predict human tendencies, the IRT DNA code is used to describe an item's tendencies. In the world of IRT, there are different models that are used relatively interchangeably. The one we use is called the three-parameter model, named as such because it has three components (called parameters), which I am likening to an item's DNA. The three parameters comprising the item's DNA are creatively named *a*, *b*, and *c*. The item parameters are defined by a mathematical model that relates them to a parameter reflecting an examinee's overall test performance, designated by the Greek letter theta (Θ). These theoretical parameters are grounded in the reality of test performance by the following relationships: *a* is related to the discrimination of the item; *b* is related to the difficulty of the item; *c* is related to the amount of guessing on the item; and Θ, as noted above, is related to the examinee's proficiency as reflected in his or her performance on the entire test.

The mathematical model that relates them all together is as follows:

$$p_j(\Theta_i) = c_j + \frac{1-c_j}{1+e^{-a_j(\Theta_i-b_j)}}$$

where $p_j(\Theta_i)$ refers to the probability of correctly answering any particular item (designated by *j*) for a person (designated by *i*) with a given value of Θ_i and *e* represents a constant that is the base of the natural logarithm and is approximately equal to 2.71828.

Figure 1 shows how *a*, *b*, and *c* interrelate in a plot of $p_j(\Theta_i)$ versus Θ. What is most important to remember for the remainder of this discussion is that each item has its own set of parameter estimates *a*, *b*, and *c*, and each examinee has a value relating to proficiency as reflected in his or her performance on the entire test that is designated by Θ.

IRT Equating Process

The actual IRT equating process is the subject of entire books, and I cannot hope to do it justice in a few paragraphs.[4] What I hope to do is give you an overview of the mechanics of what happens using my DNA metaphor. My goal is to give you a general understanding of the process and confidence in its results.

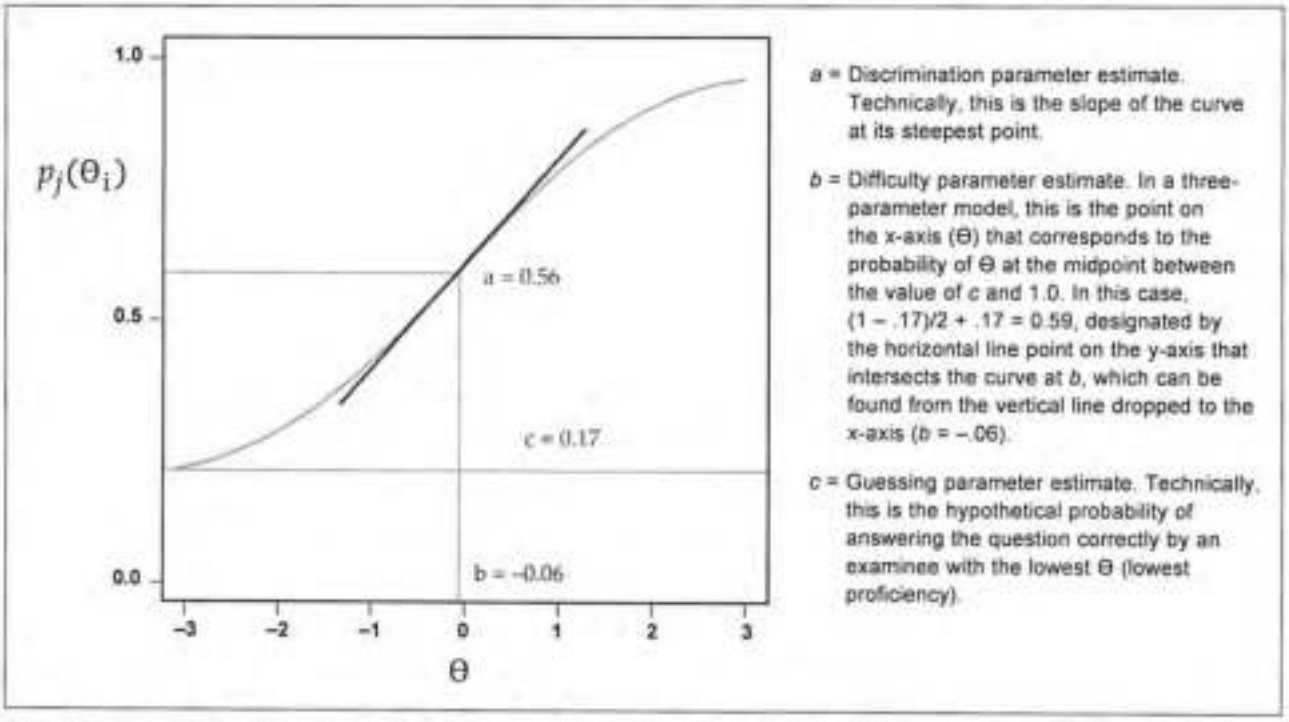

Figure 1: Example of a plot showing the probability of answering an item correctly as a function of examinee proficiency

The first step in the equating process for an examination is to obtain the estimates of each item's DNA parameters *a*, *b*, and *c*. This is done by a process called *item calibration*. I won't bore you with the details, but it is a computationally intense statistical estimation process that simultaneously considers all parameters and makes incremental changes in each until stable estimates are achieved, a state called *convergence*. As you may be able to imagine, with 200 items and over 20,000 examinees in February and over 50,000 examinees in July, this is not something that can be done with a pad of paper and a pencil; the process relies on software programs specifically designed for such a statistical estimation process. Once we have estimates of *a*, *b*, and *c* and each person's Θ values, we have some preliminary characteristics of items that are consistent within the current data; however, the items have no linkage to the historical genetics of the items.

The next step is where the equating and scaling process occurs. While there are different approaches that can be used to establish the linkage to a test's historical roots, the particular one we use is called the Stocking-Lord method, named as such after its originators. The equator items now have two sets of parameter estimates, those from the current examination and those from previous use. From the two sets of equator item parameter estimates, two sets of Θ values are produced for each examinee. The set of item parameter estimates from previous use have historical item genetics that reach back to the July 1972 examination. The set of parameter estimates from the current administration have no such linkage. What both sets of estimates do have in common is the examinee's proficiency as reflected in his or her performance on the entire test. So, the goal of this step is to find adjustments to the item parameter estimates for the current administration such that

the θ values generated have a relationship that is as close as possible to that for the θ values generated from previous use. The mathematics behind the process again gets complex, but the process of getting to the item parameter adjustments is again incremental, as it was for obtaining the initial item parameter estimates during the calibration process referred to above. The item parameter estimates are adjusted one by one, and a statistic measuring the difference in the relationships between the new and old θs and raw scores is computed. If the statistic indicates that the two are within a specified tolerance, the process is said to achieve convergence. If not, then a new value for another parameter is inserted and the process repeats until convergence is reached. This process eventually results in adjustments to each of the item parameters that will link them back to previous history in the same way that the previous item parameter estimates have been linked. As with the calibration process, with so many items and examinees and the demanding criteria that are used to define convergence, we can feel confident that what we have is something that is substantive and will stand the test of time.

The next step is to apply the item parameter equating adjustments to the rest of the items on the test. The final step is to produce a table that relates the raw scores to scaled scores.

Because of the equating and scaling process, these scaled scores have constant meaning and link back through their IRT genetics to all such scores that came before.

Final Comments

At present, we have two (or more) psychometricians independently do the equating using different programs at each examination. We have yet to have the separate results differ beyond more than two decimal places. If we ever do have differences between the different psychometricians' results, we would achieve resolution to the differences before we would release scores.

The equating process has proven to be quite robust, meaning stable in the face of change. When we added Civil Procedure to the MBE in February 2015, we conducted the equating with and without the new Civil Procedure items. The mean of resulting scaled scores including the Civil Procedure items was 136.1696 versus 136.1766 without the Civil Procedure items. In the score range between 125 and 150—4 points below and 5 points above, respectively, where any jurisdiction sets its passing score—no examinee had scaled scores that made a practical difference.

In closing, I hope that this description of the equating we do for the MBE at least gives you confidence that the scaled scores we produce are based upon substance and the highest-quality methods. ■

References

Deborah J. Harris, *Equating the Multistate Bar Examination*, 72(3) The Bar Examiner 12–18 (August 2003).

Michael T. Kane, Ph.D. & Andrew Mroch, *Equating the MBE*, 74(3) The Bar Examiner 22–27 (August 2005).

Michael J. Kolen & Robert L. Brennan, Test Equating, Scaling, and Linking: Methods and Practices (Springer 3rd ed. 2014).

Julia C. Lenel, Ph.D., *Issues in Equating and Combining MBE and Essay Scores*, (61)2 The Bar Examiner 6–20 (May 1992).

Lee Schroeder, Ph.D., *Scoring Examinations: Equating and Scaling*, 69(1) The Bar Examiner 6–9 (February 2000).

M.L. Stocking & F.M. Lord, *Developing a Common Metric in Item Response Theory*, 7 Applied Psychological Measurement 201–210 (1983).

Notes

1. Item difficulty is the percentage of examinees who answered an item correctly. It is computed by taking the number of examinees who answer an item correctly and dividing by the total number of examinees and multiplying by 100. Sometimes it is left as a fraction and not multiplied by 100. Low values—for instance, 10 examinees answering an item

correctly out of 100 taking the test, resulting in a difficulty of 10%—indicate that few examinees answered the item correctly, so the item is very difficult. High values—for instance, 90 examinees answering an item correctly out of 100 taking the test, resulting in a difficulty of 90%—indicate that a large number of examinees answered the item correctly, so the item is relatively easy. The term difficulty is something of a misnomer, because a high value means that an item is easy, while a low value indicates that an item is challenging.

2. The process for calculating an item's discrimination can be thought of as taking the top quarter of examinees (for arcane psychometric reasons we actually use 27%) based upon total exam performance and putting them in a high box, and taking the lowest quarter of examinees based upon total exam performance and putting them in a low box. For examinees in the two boxes, we compute the percentage of examinees who answered the item correctly. The difference between the percentage in the high box and the percentage in the low box is the item discrimination. For example, say we have 100 examinees. Based upon the total score on a test, we put the top-scoring 25 in the high box and we put the lowest-scoring 25 in the low box. For item 1, say 20 of the 25 examinees in the high box answered the item correctly (80%) and 10 of the 25 examinees in the low box answered the item correctly (40%). Since discrimination indexes are usually reported as proportions, the discrimination would be 20/25 – 10/25 = .80 – .40 = .40. For item selection purposes, it is essential that the discrimination index be at least positive, if not greater than .20.

3. *See* Lenel 1992 for a more detailed example of how this is done.

4. *See* Harris 2003 for a more detailed example of how this is done.

5. *See* Harris 2003 and Kane & Mroch 2005; both describe IRT in different ways, and I encourage you to read these articles if my approach leaves you either wanting or wanting more.

6. *See, e.g.*, Kolen & Brennan 2014.

MARK A. ALBANESE, PH.D., is the Director of Testing and Research for the National Conference of Bar Examiners.

Test Development and Production

The test items (questions) for all four of our tests go through multiple stages of drafting, review, and revision by practicing attorneys, judges, law school faculty members, and NCBE's attorney editors. New items are also slated for pretesting.

Note: The timeline below is approximate and may vary between tests.

Test items are developed by the **63** members of NCBE's **10** drafting committees with the support of NCBE's attorney editors.

At least **10** people—drafters, external reviewers, and NCBE staff members—review each new test item multiple times.

3 years before the exam

Drafting committee members write items following NCBE's research-based guidelines.

The full drafting committee and attorney editors review the items.

Two external reviewers check the revised items for content, bias, difficulty, clarity, and relevance.

Recently licensed attorneys pretest MEE and MPT items.

8 to 18 months before the exam

Drafting committee chairs and attorney editors select scored items for use on a new test form.

Drafting committee chairs and attorney editors select MBE and MPRE items to be placed as unscored pretest items on a new test form.

2 to 20 months before the exam

The full drafting committee reviews the new test form at least twice.

MEE and MPT test forms receive two stakeholder levels of review by the MEE/MPT Policy Committee and user jurisdictions.

NCBE test production staff members prepare and review test booklets as well as nonstandard materials for examinees granted testing accommodations under the Americans with Disabilities Act.

NCBE test production staff members perform a final quality-control check on printed test booklets and nonstandard materials.

3 to 4 weeks before the exam

Printed test booklets and nonstandard materials are shipped.

Exams are administered.

THE UBE
Multistate Uniform Bar Examination

Understanding the Uniform Bar Examination

What Is the UBE?

The Uniform Bar Examination (UBE) is prepared and coordinated by the National Conference of Bar Examiners to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. It is composed of the Multistate Essay Examination (MEE), two Multistate Performance Test (MPT) tasks, and the Multistate Bar Examination (MBE). It is uniformly administered, graded, and scored by user jurisdictions and results in a portable score.

The UBE is administered over two days, with the MBE given on the last Wednesday of February and July and the MEE and MPT given on the Tuesday prior to that. The MEE and MPT scores are scaled to the MBE, with the MBE weighted 50%, the MEE 30%, and the MPT 20%.

Jurisdictions that use the UBE continue to

- decide who may sit for the bar exam and who will be admitted to practice.
- determine underlying educational requirements.
- make all character and fitness decisions.
- set their own policies regarding the number of times candidates may retake the bar examination.
- make ADA decisions.
- grade the MEE and MPT.
- set their own pre-release regrading policies.
- assess candidate knowledge of jurisdiction-specific content through a separate test, course, or some combination of the two if the jurisdiction chooses.
- accept MBE scores earned in a previous examination or concurrently in another jurisdiction for purposes of making local admission decisions if they wish. Note: candidates must sit for all portions of the UBE in the same UBE jurisdiction and in the same administration to earn a portable UBE score.
- set their own passing scores.
- determine how long incoming UBE scores will be accepted.
- maintain the security of test content and provide appropriate testing conditions by administering the UBE at specified times and in accordance with the rules laid out in the NCBE Supervisor's Manual, including the guidelines for room setup, book distribution, seating charts, and proctor selection and training.

To ensure that candidates are assessed consistently across jurisdictions, UBE jurisdictions will

- administer the entire examination (MEE, MPT, and MBE) to each UBE candidate in the same administration. Banked, transferred, or concurrent MBE or written scaled scores earned in a prior examination or concurrently in another jurisdiction may not be used in calculating UBE total scores.
- grade the MEE and MPT using generally applicable rules of law rather than jurisdiction-specific law.
- train and calibrate their MEE and MPT graders to follow uniform standards applied by all UBE jurisdictions.

- have NCBE perform the scaling of the MEE and MPT scores to the MBE to ensure that score calculations are performed consistently across jurisdictions.
- agree that, to qualify as UBE scores, the scores will not be changed after examination results have been announced.
- report on their test administrations and permit occasional audit by NCBE to verify that best practices are being followed.

To facilitate score portability and transfers, UBE jurisdictions will

- generate a UBE total score expressed as a whole number on a 400-point scale.
- accept transferred UBE scores that meet their passing standard whether or not the score meets the passing standard in the testing jurisdiction.
- require candidates to provide sufficient information on the MBE answer sheets to identify their scores for transfer by NCBE, including the candidate's name, date of birth, NCBE Number, and the last four digits of the Social Security number.
- submit all UBE scores to a central registry maintained by NCBE to ensure that a full score history is reported by NCBE to receiving jurisdictions when candidates request UBE score transfers.
- provide, or have NCBE provide, candidates with their written scaled scores, MBE scaled scores, and UBE total scores so that candidates can determine if their scores are high enough to transfer to other jurisdictions.

Role of the Jurisdictions

Since the UBE's inception, jurisdictions have been actively involved in shaping UBE policies and implementing best practices. Representatives from UBE jurisdictions regularly discuss administrative issues and make recommendations to NCBE's Board of Trustees with respect to policy decisions related to the UBE.

2018–2019 NCBE Uniform Bar Examination Committee

Timothy Y. Wong, Chair
Falcon Heights, MN

Diane F. Bosse
Hurwitz & Fine PC
Buffalo, NY

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Washington State Bar Association
Seattle, WA

Darin B. Scheer
Crowley Fleck PLLP
Casper, WY

NCBE Chair Michele A. Gavagni and NCBE President Judith A. Gundersen are ex-officio members of the committee.

Inquiries regarding the UBE may be directed to Kellie Early at kearly@ncbex.org or 608-280-8550.

National Conference of Bar Examiners
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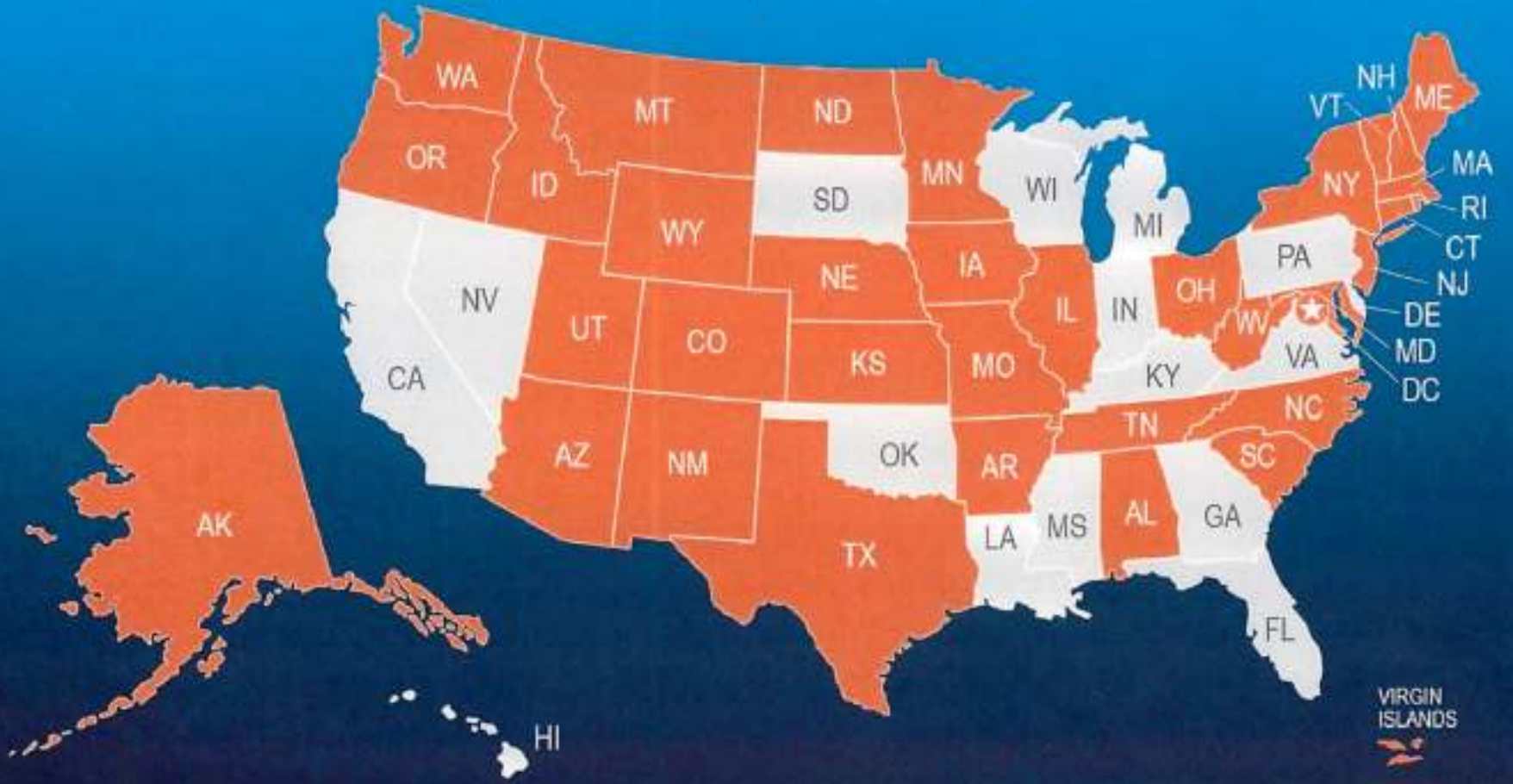
Updated 5/30/19

Jurisdictions that have Adopted the UBE

(as of May 10, 2019)*



*Illinois and Maryland will begin administering the UBE in July 2019. Ohio will begin administering the UBE in July 2020. Texas will begin administering the UBE in February 2021. Arkansas will begin administering the UBE in February 2020.

Minimum Passing UBE Scores

260
Alabama
Minnesota
Missouri
New Mexico
North Dakota

266
Connecticut
District of Columbia
Illinois
Iowa
Kansas
Maryland
Montana
New Jersey
New York
South Carolina
Virgin Islands

270
Arkansas
Massachusetts
Nebraska
New Hampshire
North Carolina
Tennessee
Utah
Vermont
Washington
West Virginia
Wyoming

272
Idaho

274
Oregon

280
Alaska

273
Arizona

276
Colorado
Maine
Rhode Island

* The minimum passing UBE scores in Ohio and Texas have not yet been announced.

A score that does not meet the minimum passing score in the testing jurisdiction may be portable to another jurisdiction if the score is at or above the level required in the receiving jurisdiction.

Maximum Age of Transferred UBE Scores

2 years

North Dakota
Rhode Island

2 years/ 5 years

Iowa
Utah

25 months

Alabama

3 years

Arkansas
Connecticut
Kansas
Maine
Maryland
Massachusetts
Minnesota
Montana
Nebraska
New Jersey
New Mexico
New York
North Carolina
Oregon
South Carolina
Virgin Islands
West Virginia
Wyoming

3 years/ 5 years

Colorado
New Hampshire
Tennessee
Vermont

37 months

Idaho

40 months

Washington

4 years

Illinois

5 years

Alaska
Arizona
District of Columbia
Missouri
Ohio

The minimum age of transferred UBE scores in Texas has not yet been announced.

*Some jurisdictions describe the maximum age in months instead of years. For the purpose of this slide, if months and years are an equal amount of time, the maximum age is stated in years.

UBE Jurisdiction-specific Law Component Requirements

No component:
Alaska, Arkansas, Colorado, Connecticut, Illinois, Iowa, Kansas, Maine, Minnesota, Nebraska, North Dakota, Rhode Island, Wyoming

Pre-admission component:
Alabama, Arizona, Maryland, Massachusetts, Missouri, Montana, New Mexico, New York, North Carolina, South Carolina, Tennessee, Virgin Islands, Washington

Post-admission component:
District of Columbia, Idaho, New Hampshire, New Jersey, Oregon, Utah, Vermont, West Virginia

* Ohio and Texas have not yet announced whether they will require a jurisdiction-specific law component.

Jurisdiction-Specific Law Components Required

Pre-admission:*

- **Live course:** Montana, New Mexico
- **Online course:** Alabama, Arizona, New York, North Carolina, South Carolina, Tennessee
- **Online open-book multiple-choice test:** Massachusetts, Missouri, New York, Virgin Islands, Washington

Post-admission course or mentorship:* District of Columbia, Idaho, New Hampshire, New Jersey, Oregon, Utah, Vermont, West Virginia

* The nature of the component that will be required in Maryland (pre-admission) has not yet been announced.

THE MPT®
MULTISTATE PERFORMANCE TEST

February 2019
MPTs and Point Sheets

National Conference of Bar Examiners
302 South Bedford Street | Madison, WI 53703-3622
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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2019 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
>
> The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
>
> You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
>
> The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
>
> Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
>
> Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
>
> Do not include your actual name anywhere in the work product required by the task memorandum.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

February 2019
MPT-1 File:
State of Franklin Department of Children and Families v. Little Tots Child Care Center

Fisher & Mason Law Office
953 N. Main St.
Evergreen Heights, Franklin 33720

MEMORANDUM

To: Examinee
From: Gale Fisher
Date: February 26, 2019
Re: Little Tots Child Care Center

We represent Ashley Baker, who became the owner and operator of the Little Tots Child Care Center eight months ago. She has received notice that, in seven days, the Franklin Department of Children and Families (FDCF) will revoke her license to operate the child care center. Because she has no administrative remedy, we have filed a complaint to challenge the license revocation and a motion seeking a preliminary injunction to prevent the revocation until a trial can be had on the merits. The court has set a date 90 days from today for a trial on the merits. The hearing on the preliminary injunction is this Friday.

At the hearing, I expect to call Ms. Baker and Jacob Robbins, a parent, as witnesses. I have attached a note Ms. Baker gave me outlining her proposed testimony. I have also attached recent communications concerning Little Tots and three Notice of Deficiency reports issued by FDCF within the last seven months. I expect that FDCF will oppose our motion and will call the inspectors to testify to what they found during the inspections.

Please prepare the argument section of our brief in support of the Motion for Preliminary Injunction to enjoin FDCF from revoking Ms. Baker's license to operate Little Tots. Follow our office guidelines in drafting your argument. Do not assume that we will have an opportunity to file a rebuttal brief; anticipate any arguments FDCF may make and address them. Be sure to address all the requirements for a preliminary injunction. Because judges must make specific findings as to the evidence relied upon in granting or denying motions for a preliminary injunction, you must marshal and discuss the evidence we have available in support of the requirements for a preliminary injunction. Do not include a separate statement of facts, but be sure to incorporate the relevant facts into your argument.

Fisher & Mason Law Office

OFFICE MEMORANDUM

To: All lawyers
From: Litigation supervisor
Date: August 14, 2016
Re: Guidelines for drafting persuasive briefs

All persuasive briefs in support of motions shall conform to the following guidelines.

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Body of the Argument

Analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated or unsupported arguments.

Organize the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position we are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, improper: "The plaintiff failed to exhaust remedies." Proper: "When the plaintiff failed to appear at the administrative hearing, after receiving notice of the hearing, and failed to request a continuance, the plaintiff failed to exhaust administrative remedies."

Do not prepare a table of contents, a table of cases, or an index.

Ashley Baker's Note on Proposed Testimony
February 25, 2019

Eight months ago, I took over the Little Tots Child Care Center to offer services no one else offered in our area. The former owner had a hard time meeting expenses because so many parents could not afford the fees. Little Tots is open more hours than most child care centers so that parents who go to work early or work late shifts can use the center. I applied for and received a government grant to subsidize the center. The grant allows me to charge reduced fees to parents whose income falls below a certain level. The grant also allowed me to hire more staff and expand the number of children Little Tots serves. Little Tots is the only child care center in this neighborhood that serves low-income families.

I have had to juggle this expansion while trying to meet all the state standards. Look at these Notice of Deficiency reports, and you will see that I have been improving all along. If I could have just a few more weeks, I would be able to comply with all the standards.

I understand the need to get completed enrollment forms so that no unauthorized persons pick up the children. We do not want predators or parents with restraining orders coming here. Most parents have completed the enrollment forms. I guess I was too patient with those five who did not complete them. I will have to sit down with these five parents and have them complete the forms when they pick up their children.

Child "A" has been with us for months. He's five; he knows he's allergic to milk and can't drink it. He's never tried to take the milk. But I will improve the supervision when food is out. I found an online education program for child care workers on food safety and will have the staff watch it.

The program we offer is excellent. In fact, since I became the owner and expanded the enrollment and improved the child care program, the State University Early Learning Center has been sending students to observe our program. The children are safe and are thriving, even if we've had some missteps while we expanded. For FDCF to come in now and close me down is too harsh.

Caring for children is my passion and my livelihood. If I'm forced to close, I will be without any income, will lose that grant, and will have to find a way to repay my business loans. I risk losing my clients if the court takes too long to resolve this. If my license is revoked, I don't know where these children are going to go or what I will do to make a living. I'm afraid that I would not be able to reopen the child care center even if I got the license back.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
Northern Regional Office
830 Highway 17
Evergreen Heights, Franklin 33720

February 22, 2019

Ms. Ashley Baker
Little Tots Child Care Center
492 Oak Street
Evergreen Heights, Franklin 33705

NOTICE OF LICENSE REVOCATION

You are hereby notified that, effective March 5, 2019, the license issued to you to operate Little Tots Child Care Center will be revoked due to numerous and repeated instances of noncompliance with critical standards for the operation of a child care center as specified in the Franklin Administrative Code and as authorized by the Franklin Child Care Center Act, Fr. Civil Code § 35.1 *et seq.* You must cease operating the Little Tots Child Care Center on or before March 5, 2019.

The instances of noncompliance are specified in the attached NOTICES OF DEFICIENCIES.

Operating a child care center without a license is a violation of the Franklin Child Care Center Act.

Signed: Carla Ortiz

Carla Ortiz
Director, Department of Children and Families

Served by email and in person February 22, 2019, by Cynthia Wood.

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
July 16, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the July 16, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Thirty days ago, Ashley Baker became the owner and operator of Little Tots Child Care Center. Upon assuming ownership, Ms. Baker expanded the number of children in the center and changed some of its operations. This is the first inspection since Ms. Baker became owner. Because of critical deficiencies observed during this inspection, Ms. Baker was warned of the need to improve and was told that, as a result, the center will be inspected every 90 days.

Little Tots has a maximum allowable enrollment of 96 children, in eight rooms: two rooms of 2-year-old children, two of 3-year-old children, two of 4-year-old children, and two of 5-year-old children. It employs 19 persons. Children may attend from 6:30 a.m. to 7:00 p.m., Monday through Friday.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 37 children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 Fr. Admin. Code § 3.06. Ms. Baker promised to correct this "very soon."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on four of the teachers—Anders, Dunn, Green, and Hanes. 34 Fr. Admin. Code § 3.12. Ms. Baker promised to "get to it soon."

Staffing. The staff/child ratios in the 2-year-old and 3-year-old rooms exceeded what is allowed. 34 Fr. Admin. Code § 3.13. There were nine children and one staff member in each of the 2-year-old rooms and 11 children and one staff member in each of the 3-year-old rooms. Ms. Baker indicated that this would be corrected "very soon."

Signed: Trent Banks

Trent Banks, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
October 19, 2018, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the October 19, 2018, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for 16 children were incomplete in that they still lacked information identifying those persons authorized to pick up those children. 34 Fr. Admin. Code § 3.06. Ms. Baker again promised to correct this "right away."

Staff qualifications. A review of the employee personnel files revealed that there was no documentation showing that a background check had been conducted on two of the teachers, Anders and Dunn, or for newly hired teacher Kane. 34 Fr. Admin. Code § 3.12. Ms. Baker promised to "get to it soon." She also said that Anders is a holdover from the previous owner and should have had the background check done long ago.

Staffing. There were nine children in one of the 2-year-old rooms, with one staff member. This exceeds the allowable staff/child ratio. 34 Fr. Admin. Code § 3.13. Ms. Baker indicated that she was still organizing her staff.

Signed: Jerome Waters

Jerome Waters, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

STATE OF FRANKLIN DEPARTMENT OF CHILDREN AND FAMILIES
January 23, 2019, Notice of Deficiencies: Little Tots Child Care Center

This report summarizes the noncompliance with critical standards observed during the January 23, 2019, inspection of the Little Tots Child Care Center, 492 Oak Street, Evergreen Heights, Franklin. This constitutes notice pursuant to § 3 of the Franklin Child Care Center Act.

Noncompliance with Critical Standards

Enrollment procedures. Enrollment forms for five children were incomplete in that they lacked information identifying those persons authorized to pick up those children. 34 Fr. Admin. Code § 3.06. Ms. Baker said that she had given the forms to these five parents but had not yet received them back.

Staff qualifications. A review of the employee personnel files revealed that there was no documentation indicating that a background check had been conducted on teacher Anders or newly hired teacher Marin. 34 Fr. Admin. Code § 3.12. Teacher Dunn is no longer employed at the center. Ms. Baker again said that Anders was hired by the previous owner and that the background check should have been done then.

Staffing. There were nine 2-year-old children in one room, with one staff member. 34 Fr. Admin. Code § 3.13. Ms. Baker said that one child was due to move out of town next week. In anticipation of that child's departure, she had enrolled another 2-year-old, but the parents needed the child to begin attending right away. The attendance of the two children overlapped by one week, putting nine children in the same room. Ms. Baker said that by next week, there will be only eight children in each 2-year-old room, and she will be in compliance with § 3.13.

Meals and nutrition. The inspector observed that as children entered the snack room, milk was available to be picked up. There was no supervision of the food area. 34 Fr. Admin. Code § 3.37. Child "A" is allergic to dairy products and should not have milk. The restriction is on the child's enrollment form, but teacher Kane said that she was unaware of any dietary restrictions for Child "A." Ms. Baker said that the teacher knew but must have forgotten on a busy morning.

Signed: Tiffany Hall

Tiffany Hall, FDCF Child Care Center Inspector

COPY OF NOTICE OF DEFICIENCY REPORT GIVEN TO OWNER/OPERATOR

Email Correspondence Regarding Little Tots Child Care Center

From: Jacob Robbins <jsdad@cmail.com>
To: Carla Ortiz <FDCFlicense@Franklin.gov>
Cc: Ashley Baker
Subject: Don't close Little Tots Child Care Center
Date: February 24, 2019, 1:15 pm

I just learned that Little Tots Child Care Center is going to close because you are revoking its license. I have talked with over a dozen parents who are upset. We do not know where to send our kids. My wife commutes to work in an office downtown, and I am a mechanic at the truck depot. The way our hours work out, we need Little Tots because it is the only child care center that meets our schedules. Plus, it is affordable.

I know families that used to rely on relatives to care for their children but were able to send them to Little Tots once Ms. Baker offered discounted rates for those who qualify. Little Tots is a better place for the children than relying on relatives who get sick or just have their own lives to live. It has a good program for the children. My kids love it there. One of my kids was really shy and hesitant to play with other kids but has overcome all that since he started attending Little Tots.

If Little Tots closes, my wife will have to quit her job. That would be bad because her job has the better health benefits. Plus, we need the money she earns to pay for the kids—their dentists' bills, their shoes, clothes, school expenses, extracurricular activities—and we save a bit for emergencies. I heard the same thing from several parents, and I promised them I would write and ask you to reconsider closing this center which we badly need.

I expect the government to care about our children. This is the only low-income child care center within 15 miles of our home. You should be advocating for us, not trying to close down such a wonderful day care.

I am going to get a petition for parents to sign to protest the closing of Little Tots, but I wanted to contact you right away.

Thank you,
Jacob Robbins

February 2019
MPT-1 Library:
State of Franklin Department of Children and Families v. Little Tots Child Care Center

Excerpts from the
FRANKLIN CHILD CARE CENTER ACT

§ 1. Findings and legislative purpose. The legislature of the State of Franklin finds the following:

(a) It is the policy of the State of Franklin to ensure the safety and well-being of preschool-age children of the State of Franklin through the establishment of minimum standards for child care centers.

(b) There is a need for affordable and safe child care centers for the care of preschool-age children whose parents are employed.

(c) There is a need for affordable and safe child care centers for low-income parents in underserved and economically depressed communities.

(d) By providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed.

* * *

§ 3. Licensing of child care centers.

(a) No person may operate any facility as a child care center without a license issued by the Department of Children and Families upon meeting the standards established for such licensing.

(b) The Director of the Department shall establish licensing standards relating to child care centers. The Director shall inspect each licensed facility at least once each year to determine that the facility is in compliance with the standards of the Department.

...

(f) If the operator of a child care center is in noncompliance with those standards deemed critical, the Director may, after notice, impose penalties including but not limited to a civil fine of at least $500 but not more than $10,000, or revocation of the license of the operator.

Excerpts from Franklin Administrative Code
Chapter 34. Child Care Centers

§ 3.01 General

The Department of Children and Families has determined that the standards listed in this Section apply to child care centers. Because of the actual or potential harm to children, noncompliance with the following regulations will be determined to be critical violations: Enrollment Procedures, Staff Qualifications, Staffing, Program, Structure and Safety, Meals and Nutrition, and Health.

* * *

§ 3.06 Enrollment procedures

...

(b) A written enrollment application with the signatures of the enrolling parents shall be on file for each child. The application shall contain the following information:

...

(8) Name, address, and telephone number of all persons authorized to pick up the child, which includes both:

(i) a primary list of persons authorized to pick up the child regularly and

(ii) a contingency list of persons authorized to pick up the child occasionally, including conditions, if any, for releasing the child to such persons.

* * *

§ 3.12 Staff qualifications

(a) Each child care center shall subject all persons who work with children to criminal background checks and shall require them to authorize the background checks and to submit to fingerprinting. No person who has been convicted of a felony shall be employed at a child care center.

...

§ 3.13 Staffing

(d) The group sizes and ratio of staff to children present in any classroom at any one time shall be as follows:

Children's age	Ratio of staff to children
Two years	1 staff member to 8 children
Three years	1 staff member to 10 children
Four years	1 staff member to 10 children
Five years	1 staff member to 20 children

• • •

§ 3.37 Meals and nutrition

(g) A child requiring a special diet due to medical reasons, allergic reactions, or religious beliefs shall be provided with meals and snacks according to the written instructions of the child's parents or legal guardian.

Lang v. Lone Pine School District
Franklin Court of Appeal (2016)

Blake and Olivia Lang, parents of Michael, age seven, sued the Lone Pine School District (District) for violating Michael's rights as a child with disabilities and sought preliminary and permanent injunctive relief. The trial court conducted a hearing on the Langs' motion for a preliminary injunction to allow Michael to attend school with a service animal, and granted that motion. The trial court stayed the effective date of the order three weeks to permit the District time to prepare for the presence of the service animal. The District filed an interlocutory appeal from the trial court's grant of the preliminary injunction. This action was brought under the Franklin Education Act. The parties did not raise, nor do we address, the question whether the plaintiffs also have a claim under the Americans with Disabilities Act or the Individuals with Disabilities Education Act.

We review the trial court's decision under the abuse of discretion standard and affirm.

Background

At the hearing, Blake and Olivia testified that during kindergarten and first grade at Lone Pine Elementary School, Michael received various accommodations to address his learning disability, but he still struggled. Last winter, the Langs found a service dog program for children with disabilities. In late spring, Sandy, a service dog, went home with the Langs, after which the Langs noticed a significant improvement in Michael's ability to focus and remain attentive to tasks. In June, an educational specialist recommended that the service dog should accompany Michael to school. The Langs then asked the District to permit Michael to attend school with the service animal.

Cody Black, the educational specialist, testified that he observed Michael with Sandy and found that Sandy provides comfort to Michael and eases his anxieties. This permits Michael to better focus on tasks before him. Black offered the opinion that Michael would perform better in school if Sandy were with him. Specifically, when Michael is accompanied by Sandy, his behavior and social skills improve and he is therefore less likely to be disruptive. Black also testified that service animals provide a similar benefit to disabled students at all levels of education throughout the state, as well as a positive educational lesson for all students.

MacKenzie Downs, principal of Lone Pine Elementary School, testified that the District denied the Langs' request because (1) a district-wide policy prohibits animals in school buildings other than service animals for those with vision impairments, (2) the teachers and staff at Lone Pine are not trained to handle the dog, and (3) there are children at the school who are allergic to dogs. Downs agreed that Michael needs an accommodation and said that she stands ready to support Michael with other methods of assistance. Joe Ramirez, Michael's first-grade teacher, testified that Michael has improved over the course of the past school year despite not having a service animal with him at school. He also testified that the District has purchased several new computers designed for children with learning disabilities. He offered the opinion that using the new computers would help Michael continue to improve, and he saw no need for the service animal to be at school. He confirmed that he and his fellow teachers have received no training in handling service animals.

Preliminary Injunction Standard

Preliminary injunctive relief is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. A party seeking a preliminary injunction must meet this four-factor test: (1) that the moving party is likely to succeed on the merits, (2) that the moving party will suffer irreparable harm if the injunction is not granted, (3) that the benefits of granting the injunction outweigh the possible hardships to the party opposing the injunction, and (4) that the issuance of a preliminary injunction serves the public interest.

(1) Likelihood of success on the merits

First, as to the likelihood of success on the merits, the moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he will be entitled to if successful at trial on the complaint for permanent relief. A party seeking preliminary relief need only demonstrate that his chances to succeed on at least one of his claims are better than negligible. *Smith v. Pratt* (Fr. Ct. App. 2001). As the court ruled, if the movant shows that his chance of succeeding on his claim for relief is better than a mere possibility, the court should grant the motion for preliminary relief.

The trial court found that there was no dispute that Michael is a child with a disability and requires an accommodation. The trial court found that while there was a dispute as to the type of

accommodation needed and whether the service animal is a proper or necessary accommodation, this was an issue to be decided when the matter is tried on the merits. In the meantime, the Langs have established that the service animal may well be the sort of accommodation needed. Hence, the Langs have shown a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial.

(2) Irreparable harm

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party, the Langs, could be compensated through damages for the wrong suffered, they would not have suffered an irreparable injury. The alleged harm here is the harm to Michael of continuing to attend school without the accommodation that may be most helpful to him. While the trial court could award damages to the Langs after a trial on the merits, here it found that no amount of monetary damages could substitute for providing Michael the education he needs.

(3) Balance of benefits and hardships

The court must weigh the benefits of granting the injunction against the possible hardships to the party opposing the injunction. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. The District argues that the trial court failed to properly consider the costs of permitting the animal to accompany Michael.

The trial court acknowledged that the District would suffer hardships if the injunction were granted. The District's policy currently allows service animals for those with vision impairments but not for those with learning disabilities like Michael's. To permit the animal to accompany Michael, the District must expand its policy, prepare its staff for the presence of the animal, educate parents, and determine how to accommodate children with dog allergies. The trial court found that these steps would cost the District time and money—costs that may be substantial. The trial court weighed the harms cited by the District against those of Michael's loss of an accommodation that will help him overcome his learning disability. Michael is in second grade and has already experienced two years of schooling that has been stressful for him. The sooner Michael's needs are met, the better for him, the trial court concluded, especially given that Michael is in an early

formative period. In sum, the trial court weighed the hardships and found that the balance of harms favored the Langs.

(4) Public interest

Fourth, the trial court must consider whether issuance of the preliminary injunction serves the public interest. This criterion cuts both ways on the facts of this case. On the one hand, the District correctly notes that its need to conserve resources and to assure the well-being of all its students serves the public interest. On the other hand, the Langs are also correct that the injunction will serve the statutory purposes of the laws protecting disabled children by permitting the use of service animals in schools. Additionally, the presence of the service animal in Michael's classroom provides important educational lessons for his classmates and for children throughout the school. These children will learn about the important role of service animals in assisting persons with disabilities. The trial court did not err in concluding that issuance of the injunction served the public interest.

The District also argues that the injunction imposes a continuing duty of supervision on the court, which would be an improper use of judicial resources. "Courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the activities of the parties." *Franklin Envt'l Prot. Agency v. Brunson Mfg., Inc.* (Fr. Ct. App. 1999). However, the District overstates the difficulty of enforcement. The trial court ordered the District to permit Michael to attend school with the animal. Compliance with this order is simple. If the District admits Michael with the service animal, it will be in compliance with the injunction. If the District refuses to admit Michael with the service animal, it will be in violation of the injunction.

The trial court issued a preliminary injunction effective until trial on the merits. The trial court did not abuse its discretion.

Affirmed.

February 2019
MPT-2 File:
In re Remick

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM

TO: Examinee
FROM: Susan Daniels
DATE: February 26, 2019
RE: Andrew Remick matter

Our client, Andrew Remick, was injured when his car stalled on a roadway and was struck by another vehicle. At the time of the accident, Remick was in the backseat of his car with a twisted ankle while a motorist, Larry Dunbar, attempted to jump-start the car with his truck's battery. Another motorist, Marsha Gibson, drove around a bend in the road, was unable to stop in time, and struck Remick's stalled car from behind. As a result of the collision, Remick was seriously injured and his car sustained significant damage.

Remick wants to know if he has any legal recourse. We talked about suing Marsha Gibson, and I suggested that there may also be a claim against Larry Dunbar. Remick told me that he thought the collision could have been avoided if Dunbar had either moved Remick's stalled car to the side of the road, set out emergency flares, or turned on the hazard lights on his truck.

Please draft a memorandum to me analyzing and evaluating whether Remick has a viable negligence claim against Dunbar. In addressing the element of duty, discuss the legal theories under sections 42 and 44 of the Restatement (Third) of Torts. Do not address either Gibson's liability or any defenses based on Remick's conduct.

Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. I will ask another associate to assess the claim against Gibson.

Transcript of Interview of Andrew Remick
February 19, 2019

Attorney: Andrew, it's good to meet you. How are you doing?

Remick: I'm feeling better than I was a month ago, but I'm still on the mend.

Attorney: Why don't you tell me what happened.

Remick: Well, on January 20, I was driving my car on Highway 290 down by the coast. It's a two-lane road with small towns scattered here and there.

Attorney: Yes, I've been down that way before, and I recall that it's a pretty isolated stretch. How did the accident occur?

Remick: I was on my way back to Franklin City from a weekend trip. It was about 4:30 p.m., and all of a sudden my car stopped working. It just powered off and the dashboard display stopped working. I tried to start the car, but the engine wouldn't even turn over. I tried to turn on the hazard lights, but they didn't work either.

Attorney: Were you able to pull over to the side of the road?

Remick: No, the engine died while I was driving; I didn't have time to pull off the road.

Attorney: What did you do next?

Remick: First, I tried to use my cell phone to call for help, but I couldn't get a signal. I tried to push the car to the shoulder of the road. Since it's a stick shift, it can be moved, but when I tried to move it, I slipped and fell, badly twisting my right ankle. I was in excruciating pain and I could barely put any weight on it. I decided to get into the backseat to keep my ankle elevated and wait for somebody to drive by.

Attorney: And did that happen?

Remick: Yes, about 45 minutes later, a man named Larry Dunbar pulled up on the shoulder of the road next to my car, got out of his truck, and asked me if I needed help. I explained what had happened. Larry said that he was a mechanic and offered to help me.

Attorney: What did he do?

Remick: He went back to his truck, grabbed a toolbox, and began poking around under the hood of my car. I'm not very knowledgeable about cars, but I remember him

mentioning that he thought my car might have a bad alternator, which is part of the car's electrical system, so he was going to try to jump-start the car to see if the alternator was working.

Attorney: Where were you when all this was happening?

Remick: I was still sitting in the back of my car with my right foot elevated on the backseat. By this time, it was starting to get dark. My ankle had swelled up, and I was in a lot of pain. I told Larry I was worried about the fact that it was getting dark and my car was still parked on the road. I asked him if he could push the car off the road. He told me not to worry because he thought he could get the car started pretty quickly. I told him that I had emergency flares in the trunk; he said not to worry.

Attorney: Was he able to jump-start your car?

Remick: I never found out. Right after he attached the jumper cables, I heard another car coming around the bend behind my car and then I heard the screech of tires as the driver hit the brakes, but she couldn't stop in time. She hit my car, with me still in the backseat! The impact was so hard that it slammed me into the back of the driver's seat. I blacked out, and when I woke up, I was in the hospital.

Attorney: I can see a brace on your left shoulder, and your left arm is in a cast and a sling. Is that from the accident?

Remick: Yes, the impact of the collision dislocated my shoulder, broke my arm, and gave me a minor concussion. The ankle I initially twisted when I fell is nearly healed, and my doctor doesn't anticipate any long-term complications from the concussion. But the orthopedist thinks I will probably need surgery to repair the damage to my shoulder, and my broken arm will need to heal for at least another three to four weeks before the cast can be removed. I've been told that I'll have to undergo physical therapy for several months to regain full function in my left arm and shoulder. I'm really worried about my shoulder and my arm. I own a small landscaping business, and most of my work is very physical. Without full use of my shoulder and arm, I can't work.

Attorney: What about Larry Dunbar and the other driver, Marsha Gibson?

Remick: I don't know. I've never met or spoken to the other driver, Marsha Gibson, and I haven't seen or spoken to Larry Dunbar since the accident.

Attorney: What about your car? How badly was it damaged?

Remick: It turns out that my car stalled because of a bad alternator, which would have cost a few hundred dollars to fix. But now it's going to cost at least $4,500 to repair the damage caused by the collision.

Attorney: Was a police report generated for the accident?

Remick: I don't know. In the month since the accident, I've been focused on my recovery and trying to keep my landscaping business afloat. I think that the accident could have been avoided if Larry had taken the time to move my car to the side of the road or if he had at least turned on the hazard lights on his truck—you know, the "flashers"—or used my emergency flares. If he had done any of those things, I doubt that the other driver would have hit my car, and I would be nursing a sore ankle instead of facing shoulder surgery and months of rehabilitation.

Attorney: You may have a case against Larry Dunbar as well as against the driver who hit you. I'll get back to you as soon as we have completed our initial assessment of your case.

Remick: Thanks. I really appreciate your assistance.

Daniels & Martin LLP
Attorneys at Law
3200 San Jacinto Blvd., Suite 270
Franklin City, Franklin 33075

MEMORANDUM TO FILE

FROM: Peter Nelson, Private Investigator
DATE: February 22, 2019
RE: Andrew Remick matter

As requested, I have obtained a copy of the police report for the car accident that occurred on January 20, 2019. I also interviewed Marsha Gibson, the driver of the SUV that rear-ended Remick's stalled car, and gathered some initial background information about Larry Dunbar. Below is a summary of my findings.

Police Report:

- A two-car collision involving Remick's four-door passenger car and Gibson's SUV occurred at approximately 6:00 p.m. on January 20, 2019, on a relatively remote, two-lane stretch of Highway 290 between the towns of Castlerock and Highwater.
- At the time of the collision, Remick's car was stalled on the northbound lane of the highway, approximately 75 feet beyond a bend in the road.
- Remick was sitting in the backseat of his car at the time of impact.
- Dunbar's truck was parked on the shoulder of the northbound lane next to Remick's car.
- The hoods of Remick's car and Dunbar's truck were up, and Dunbar was in the process of jump-starting Remick's car battery.
- Gibson was driving northbound on Highway 290 at approximately 50 mph (the speed limit is 55 mph).
- Skid marks measured at the scene of the accident indicate that Gibson immediately applied the brakes on her vehicle but was unable to avoid hitting Remick's car. Her estimated speed at impact was 25 mph.
- The force of the collision caused Remick to slam into the driver's seat in front of him, as a result of which he suffered a concussion, a dislocated shoulder, and a broken arm. He was transported by ambulance to Castlerock Hospital for medical treatment.

- Neither Gibson nor Dunbar was injured by the collision.
- No persons were cited or ticketed for the accident, although the responding police officer noted that the accident occurred at dusk and that neither Remick's car nor Dunbar's truck had its hazard lights turned on.

Marsha Gibson's Statement to Police:

- Gibson claims that she was driving under the speed limit at the time of the collision.
- Gibson did not see Remick's unlit car until she was about 40 feet away from it because it was getting dark outside and Remick's car was parked just beyond a bend in the road.
- Gibson estimates that she was driving at about 25 to 30 mph when she collided with Remick's car.
- Gibson was not injured in the accident.

Larry Dunbar Background Information:

- Dunbar is 35 years old and currently works in cable TV sales.
- Dunbar is a former automotive mechanic, having spent three years working for Franklin City Automotive from 2012 to 2015.

February 2019
MPT-2 Library:
In re Remick

Excerpts from Restatement (Third) of Torts (2012)

§ 42 Duty Based on Undertaking

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:

(a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking, or

(b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking.

Comment:

* * *

c. . . . [A]ffirmative duty based on undertaking . . . The duty provided in this Section is one of reasonable care. It may be breached either by an act of commission (misfeasance) or by an act of omission (nonfeasance).

d. Threshold for an undertaking. An undertaking entails an actor voluntarily rendering a service . . . on behalf of another . . . . The actor's knowledge that the undertaking serves to reduce the risk of harm to another, or of circumstances that would lead a reasonable person to the same conclusion, is a prerequisite for an undertaking under this Section.

* * *

§ 44 Duty to Another Based on Taking Charge of the Other

An actor who, despite no duty to do so, takes charge of another who reasonably appears to be:

(1) imperiled, and

(2) helpless or unable to protect himself or herself

has a duty to exercise reasonable care while the other is within the actor's charge.

Comment:

* * *

c. Distinctive feature of rescuer affirmative duty. This Section is limited to instances in which an actor takes steps to engage in a rescue by taking charge of another who is imperiled and unable

adequately to protect himself or herself. The duty is limited in scope and duration to the peril to which the other is exposed and requires that the actor voluntarily undertake a rescue and actually take charge of the other.

* * *

g. Taking charge of one who is helpless. The rule stated in this Section is applicable whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care. The rule is equally applicable to one who is rendered helpless by his or her own conduct, including intoxication; by the tortious or innocent conduct of others; or by a force of nature. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril.

Weiss v. McCann
Franklin Court of Appeal (2015)

Plaintiff David Weiss, individually and in his capacity as guardian for Janet Weiss, appeals the dismissal of his personal injury action against Sue McCann for serious injuries his wife sustained at a party hosted by McCann. The issue on appeal is whether the Restatement (Third) of Torts §§ 42 and 44, collectively referred to as the "affirmative duty" or "Good Samaritan" doctrine, should apply to a homeowner. We find that under the specific facts of this case the Good Samaritan doctrine does apply. Accordingly, we reverse the order of the trial court dismissing the action.

The relevant facts and procedural history are as follows: On December 29, 2013, McCann hosted a party at her home in her basement recreation room. Janet Weiss, a neighbor, was among the attendees. Both McCann and Weiss had been drinking alcoholic beverages that evening. When the party ended and everyone had left except Weiss and McCann, Weiss fell, struck her head on the concrete floor, and lost consciousness. McCann revived Weiss and placed her on a couch. The next morning Weiss awoke and walked home, without informing McCann that she was leaving. At 9:30 a.m., McCann called Weiss's home to see whether Weiss had arrived home safely. McCann spoke to Weiss's husband, David, who said that Weiss was home and asleep. During the call, McCann did not mention that Weiss had fallen and hit her head. McCann called again at 11:30 a.m. to check on Weiss and for the first time informed David of his wife's fall and injury. David checked on Weiss and was unable to wake her, so he immediately called 911. An ambulance took Weiss to the hospital, where she had emergency brain surgery for a subdural hematoma. As a result of the injury, she suffered permanent brain damage. David Weiss brought this personal injury action against McCann, alleging that McCann was negligent in caring for Weiss after her fall and injury. McCann moved to dismiss the complaint for failure to state a cause of action, and the trial court granted the motion.

On appeal, the plaintiff claims that his complaint properly stated a cause of action in negligence based on the common law "affirmative duty" or "Good Samaritan" doctrine set forth in Restatement (Third) of Torts §§ 42 and 44, which has been adopted by the Franklin courts. To determine whether the trial court properly granted McCann's motion to dismiss, this court must consider as true all of the well-pleaded material facts set forth in the complaint and all reasonable inferences that may be drawn from those facts. *Davis v. Humphreys* (Franklin Sup. Ct. 1996).

As a preliminary matter, we note that to establish a viable cause of action in negligence, a plaintiff's complaint must allege the following four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Fisher v. Brown* (Franklin Sup. Ct. 1998).

On appeal, the plaintiff first claims that he presented facts establishing a duty under the Restatement (Third) of Torts § 42, which provides, "[a]n actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if: (a) the failure to exercise [reasonable] care increases the risk of harm beyond that which existed without the undertaking or (b) the person to whom the services are rendered . . . relies on the actor's exercising reasonable care in the undertaking."

We conclude that the language of § 42 envisions the assistance of a private person, such as McCann, to a person in need of aid. Based on the plain language of the Restatement, we will not, as a matter of law, preclude the application of § 42 to a homeowner such as McCann.

We now consider whether § 44 of the Restatement (Third) of Torts should apply as well. Section 44 provides that "[a]n actor who, despite no duty to do so, takes charge of another who reasonably appears to be: (1) imperiled; and (2) helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge." Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care," including "one who is rendered helpless by his or her own conduct, including intoxication." § 44, comment g. Based on this language, it is clear that § 44 may apply to the homeowner McCann in this case.

The plaintiff's complaint alleges that McCann did not contact Weiss's family or seek medical assistance for Weiss after she fell and then failed to inform the plaintiff of Weiss's fall and injury until nearly noon the next day, at which point the plaintiff was unable to revive his wife. Based on our review of the language of the Restatement and the applicable case law, we cannot, as a matter of law, preclude the application of § 44 to McCann.

Reversed and remanded with instructions to the trial court to reinstate the complaint.

Thomas v. Baytown Golf Course
Franklin Court of Appeal (2016)

This interlocutory appeal stems from a wrongful death action brought by the surviving family members of Seth Thomas, who was killed in an automobile accident. Defendant Baytown Golf Course (Baytown) petitions for review of the trial court's order striking Baytown's notice that another individual, Glenn Parker, who was not named in this lawsuit, was a participating cause of the fatality and hence liable for comparative apportionment of damages under Franklin law. We conclude that Parker could be liable as a nonparty for the fatal accident after Parker assumed the duty of a "Good Samaritan" to use reasonable care for Thomas, but in fact placed Thomas in a worse position by giving his keys back to him and allowing him to drive away.

FACTS

On June 3, 2012, Thomas and Parker played golf and consumed alcoholic beverages at Baytown. Because Thomas appeared intoxicated, a Baytown employee took possession of Thomas's car keys. Parker then stepped forward and offered to drive Thomas home. With that assurance, and observing Parker's apparent lack of impairment, the employee gave Thomas's keys to Parker. Once in the parking lot, Parker returned the keys to Thomas. Thomas left the golf course in his own car and crashed into a tree. He died from his injuries.

The plaintiffs brought a wrongful death action against Baytown alleging that Baytown's sale of alcohol to Thomas was the cause of the accident. Baytown filed a notice of nonparty at fault, alleging that Parker was at least partially at fault because he volunteered to drive Thomas home and then gave the car keys back to Thomas. The plaintiffs filed a motion seeking to strike Baytown's notice of nonparty at fault. The trial court granted the motion, and this interlocutory appeal followed. For the reasons set forth below, we agree with Baytown that the trial court erred, and so reverse and remand.

DISCUSSION

Rule 28 of the Franklin Rules of Civil Procedure provides that a defendant can give notice that a person or entity not a party to the action is allegedly wholly or partially at fault for the purpose of determining the respective liability of all actors under Franklin's comparative negligence laws. The jury is required to consider the fault of all persons who contributed to the alleged injury, regardless of whether the person was, or could have been, named as a party to the

suit. Once a defendant designates a person as a nonparty at fault by filing the appropriate notice with the trial court, the defendant can offer evidence of the nonparty's negligence and argue that the jury should attribute some or all fault to the nonparty, thereby reducing the defendant's percentage of fault and consequent liability.

The issue, then, is whether Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault. To find a person at fault in a negligence action, four elements must be shown: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *See Fisher v. Brown* (Franklin Sup. Ct. 1998). A duty must be recognized by law and must obligate a defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Id.*

Baytown argues that Parker had a duty to Thomas under the Good Samaritan doctrine set forth in the Restatement (Third) of Torts §§ 42 and 44. In its docket entry striking Baytown's notice of nonparty at fault, the trial court stated, "Mr. Thomas was not . . . 'helpless' as that term is used in § 44. He was simply too drunk to drive." We disagree. The determination of whether an individual is "imperiled" and "helpless" must be made within the context of each case. A person who is drunk and slumped in a chair at home in front of the television may not be considered imperiled and helpless. However, we reach the opposite conclusion if the same person is put behind the wheel of an automobile and sent down the road. Moreover, comment g to § 44 specifically provides that § 44 applies where a person "is rendered helpless by his or her own conduct, including intoxication."

Although the trial court's order focused on § 44, we find that both sections of the Restatement are applicable to the facts of this case. The major difference between the sections is the requirement of § 44 that the person be in an imperiled, helpless position. Section 42 has no such requirement, but does require either that the actor's actions increased the risk of harm or that the victim relied on the actor. In either event, we believe that the Good Samaritan doctrine applies when an actor, otherwise without any duty to do so, voluntarily takes charge of an intoxicated person who is attempting to drive a vehicle and, because of the actor's failure to exercise reasonable care, changes the other person's position for the worse. The rule applies here because if Parker had not said that he would see that Thomas got home safely, Baytown might have taken steps that would have avoided the accident.

The plaintiffs argue that Parker did not have a duty to Thomas because it was Baytown

that first provided Thomas with the alcohol that rendered him too drunk to drive. The plaintiffs contend that the duty of care that Baytown owed to Thomas as a patron in its bar is not one that can be delegated. We agree that Baytown's duty cannot be delegated. Baytown, however, is not trying to delegate its responsibilities to Parker. Rather, Baytown argues, and we agree, that the duties owed by Baytown and Parker are independent of each other.

When Parker took charge of Thomas for reasons of safety, he thereby assumed a duty to use reasonable care. Thomas was too drunk to drive. Baytown's employees had taken charge of Thomas and effectively stopped him from driving. Parker's offer deterred the employees from their efforts to keep Thomas out of his automobile. Rather than use reasonable care to drive Thomas home or make other arrangements, Parker discontinued his assistance and put Thomas in a worse position than he had been in when Baytown's employees had possession of his keys. A reasonable fact-finder could conclude that Parker's actions contributed to Thomas's death, rendering Parker wholly or partially at fault.

We conclude that the trial court erred in striking Parker as a nonparty at fault and therefore reverse and remand for further proceedings.

Boxer v. Shaw
Franklin Court of Appeal (2017)

Plaintiff Karen Boxer, as personal representative of the estate of Tim Boxer, appeals the dismissal of her wrongful death action against defendant Harry Shaw. Tim Boxer was struck and killed by a truck after exiting Shaw's car on the side of a highway. The trial court granted Shaw's motion for a directed verdict. We affirm.

At trial, Shaw testified that he and Boxer were coworkers who often socialized together. On the day of the accident, he and Boxer finished work early, around 3 p.m., and decided to go fishing. Shaw offered to drive because Boxer's car was in the shop. The two men fished for about three hours. They then went to a marina, watched the boats, and played pool until about 10 p.m., at which time they decided to go to a nightclub. They were driving on Highway 101 to the club when they got into a heated argument. Boxer started cursing and demanded that Shaw stop the car. Shaw pulled onto the shoulder of the road, and Boxer exited the car and lit a cigarette. Shaw has stated that he thought Boxer would get back in the car after smoking his cigarette, but Boxer refused to do so. Shaw decided to briefly drive away to allow Boxer to "cool off." Shaw drove one mile down the road and then returned. In the meantime, Boxer attempted to cross the highway and was struck by a truck.

Shaw testified that, although the two men had consumed a few beers while playing pool, Boxer did not appear to have had too much to drink. The toxicology and autopsy reports confirmed that Boxer's blood alcohol level was under the legal limit. It is undisputed that the accident occurred around 10:30 p.m., it was dark with misting rain, there were no lights on the highway, and Boxer was wearing dark clothing. The investigating police officer testified that the shoulder of the highway was "extremely wide" and agreed that there was ample room for a pedestrian to walk there.

On appeal, the plaintiff argues that the trial court erred by directing a verdict for Shaw on the issue of duty. The plaintiff contends that she presented evidence that Boxer was "helpless" and that Shaw had "taken charge of" Boxer after the two men left work to go fishing and thereby had assumed a duty to leave Boxer in no worse a position than when he took charge of him. We must determine whether the trial court erred in finding that Shaw owed no duty of care to Boxer because Boxer was not "helpless" and Shaw did not "take charge of" him.

In reviewing a ruling granting a directed verdict, the evidence and all reasonable

inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. *Ellis v. Elwood* (Franklin Sup. Ct. 1995). In a negligence action, if there is no duty, then the defendant is entitled to a directed verdict. *Id.*

An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. The common law ordinarily imposes no duty on a person to act; however, where an act is voluntarily undertaken, the actor assumes the duty to use reasonable care. *Id.*

The Restatement (Third) of Torts § 44 provides that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself has a duty to exercise reasonable care while the other is within the actor's charge.

Under the Restatement, an intoxicated person is considered helpless. § 44 comment g. However, the undisputed evidence in this case indicates that Boxer was not "helpless." The mere fact that Boxer's car was being repaired did not render him helpless, and his blood alcohol level was below the legal limit. There was testimony from a family member that Boxer was in the midst of a nasty divorce and that he was very upset about the breakup of his marriage. However, the fact that a person may be distraught about a situation does not render that person "helpless" without additional evidence of actual impairment.

Even if we assume that Boxer was "helpless" under the circumstances, to show that Shaw "took charge" of Boxer, the plaintiff would have to show that Shaw through affirmative action assumed an obligation or intended to render services for Boxer's benefit. *See, e.g., Thomas v. Bayview Golf Course* (Franklin Ct. App. 2016) (golfer assumed duty by telling golf course employee who had taken car keys from an intoxicated man that the golfer would drive the man home); *Sargent v. Howard* (Franklin Ct. App. 2013) (driver could be held liable for injuries sustained by ill passenger who was attacked after being left in an unlocked, running vehicle at night while driver used a convenience store restroom).

Viewing the evidence in the light most favorable to the plaintiff, the facts do not indicate that Shaw, through affirmative action, assumed an obligation or intended to render services for Boxer's benefit. We disagree with the plaintiff's claim that Shaw "took charge of" Boxer when the two men left work to socialize on the day of the accident, nor did he do so at any point throughout the remainder of the day. Boxer was not legally intoxicated and he was not helpless.

Accordingly, Shaw could not have assumed an obligation to render services for Boxer's benefit. Granted, on the day of the accident, Shaw drove. However, Shaw's driving is not evidence of the assumption of an affirmative obligation by Shaw to take care of Boxer. It is undisputed that both men mutually agreed to go fishing, visit the marina, and head to the nightclub. There is no suggestion that Shaw directed when and where he and Boxer would go, or that he intended to "take charge of" Boxer.

Because the plaintiff presented no evidence from which a jury could find that Boxer was "helpless" or that Shaw "took charge of" him, the trial court correctly concluded that Shaw had no duty to Boxer and properly directed the verdict for Shaw.

Affirmed.

February 2019
MPT-1 Point Sheet:
State of Franklin Department of Children and Families v. Little Tots Child Care Center

FDCF v. Little Tots Child Care Center

DRAFTERS' POINT SHEET

In this performance test, examinees are to draft a Memorandum in Support of Motion for Preliminary Injunction seeking to restrain the Franklin Department of Children and Families (FDCF) from revoking the license of Ashley Baker to operate the Little Tots Child Care Center. Baker became the owner and operator of Little Tots eight months ago. Upon an initial inspection after she became the owner, FDCF found several violations it deemed critical. FDCF then inspected Little Tots every 90 days and continued to find violations. After three failed inspections, the director issued a Notice of Revocation of the license to operate the center, which will take effect in seven days.

Baker believes that if given a few more weeks, she will be in compliance with all the standards. Each FDCF inspection report shows improved compliance. Baker has been challenged to meet the standards while making several changes to the operation of the center since becoming owner. She obtained a government grant that allows her to offer reduced fees to qualifying parents, and she expanded the center's enrollment. She is meeting a community need. She wants to challenge the license revocation.

The supervising attorney has filed the complaint for preliminary and permanent relief and the motion for preliminary injunction. Examinees' task is to draft a Memorandum in Support of Motion for Preliminary Injunction. The supervising attorney expects to call as witnesses to testify at the motion hearing Ms. Baker and Jacob Robbins, a parent who has emailed FDCF in support of the center.

The File consists of the memorandum from the supervising attorney, the office guidelines for drafting persuasive briefs, a statement from Ms. Baker, the Notice of Revocation, the FDCF inspection reports, and the email from Jacob Robbins. The Library contains excerpts from the Franklin Child Care Center Act, FDCF regulations implementing the Act, and a Franklin case outlining the requirements for a preliminary injunction.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees are directed to prepare a Memorandum in Support of Motion for Preliminary Injunction to restrain FDCF from revoking Baker's license to operate Little Tots. They are to draft the memorandum in accordance with the firm's guidelines. There may not be an opportunity to file a rebuttal memorandum, thus examinees should anticipate and address any arguments FDCF may make. Because the courts require that judges make specific findings of fact when granting or denying motions for preliminary injunction, examinees are directed to detail all the evidence available in support of the requirements for a preliminary injunction.

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support the client's position. Supporting authority should be emphasized, but contrary authority should generally be cited and explained or distinguished. Examinees are directed not to reserve arguments for reply briefing and to be mindful that courts are not persuaded by exaggerated or unsupported arguments.

The firm's guidelines direct examinees to break the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The headings should effectively summarize the reasons the tribunal should take the position being advocated.

In their argument, examinees should set out the four requirements for a preliminary injunction and show how the evidence provided will meet those requirements. They should also address the general purpose of a preliminary injunction.

II. OVERVIEW OF THE LAW

The case of *Lang v. Lone Pine School District* explains that a preliminary injunction is an extraordinary remedy and is disfavored by the courts. This relief will be granted, however, in appropriate cases to preserve the status quo pending a decision on the merits. The party seeking such a remedy must present evidence that meets the four requirements for a preliminary injunction: likelihood of success on the merits, irreparable harm, a balancing of the hardship to the opposing party if the relief is granted and the harm to the movant if it is not, and a consideration of whether issuance of the preliminary injunction serves the public interest. Franklin case law requires courts issuing preliminary injunctions to specify the evidence considered in issuing the injunction.

The Franklin Child Care Center Act (FCCCA) requires that anyone operating a child care center be licensed. FCCCA § 3(a). The Act requires the director of FDCF to establish rules relating to the operation of child care centers and to inspect the centers at least annually. *Id.* § 3(b). The director is empowered to impose fines or revoke the license of a center that, after warning, continues to be in noncompliance with standards deemed critical. *Id.* § 3(f).

FDCF has promulgated rules for the operation of child care centers in the Franklin Administrative Code. Violations of certain specified standards are deemed critical. 34 Fr. Admin. Code § 3.01.

III. FACTS

Eight months ago, Ashley Baker became the owner and operator of the Little Tots Child Care Center, which serves working-class parents by having early and late hours. She obtained a government grant to subsidize the cost of the center so that she could offer low-fee care for working parents. Little Tots is the only center in the neighborhood that has expanded hours and offers low-fee care. Since Baker began running Little Tots, the State University Early Learning Center has sent its students there to observe its program. At the time of the initial inspection,

Little Tots had a maximum allowable enrollment of 96 children. There are two rooms for each age level: 2-year-old children, 3-year-old children, 4-year-old children, and 5-year-old children. It had 19 employees.

After Baker assumed ownership, FDCF inspected the center and observed various violations (i.e., "noncompliance with critical standards"). Because of these deficiencies, the center was inspected every 90 days to the present. The violations of those standards deemed critical by FDCF are failure to complete background checks on some employees, failure to have records of those individuals authorized to pick up children from the center, inadequate staffing, and a failure to adequately supervise the dietary offerings. After three inspections with critical violations, the FDCF director revoked Baker's license to operate the center.

Baker maintains that a review of the inspection reports shows that she has made steady improvement in complying with the standards. If given a few more weeks, she believes that she will be in complete compliance. Operating Little Tots provides Baker's sole income and means of repaying the loans she incurred to purchase it. A parent, Jacob Robbins, has emailed FDCF and described the hardships to parents that will follow if the center is closed.

IV. Argument

A. General argument in support of preliminary injunction

Examinees should argue the following points in the memorandum:

- A preliminary injunction is an extraordinary remedy and is disfavored by the courts, but this relief may be granted in appropriate cases to preserve the status quo pending a decision on the merits. *Lang*.
  - The purpose of a hearing on the motion for preliminary relief is not to decide the case on the merits. *Id.*
- In issuing an injunction, a court should be careful that it does not become a supervising agency, overseeing the actions of the object of the injunction. *Franklin Envt'l. Prot. Agency v. Bronson Mfg., Inc.* (Fr. Ct. App. 1999), cited in *Lang*.
  - Issuance of a preliminary injunction here will avoid making the court a supervisory agency. The court can simply restrain FDCF from revoking Baker's license until the trial on the merits, set for 90 days from now. The court need not further involve itself in the regulation or operation of the center.
- In granting or denying a motion for preliminary injunction, the trial court must describe the evidence on which it relied in making its decision.
- Granting the injunction will preserve the status quo, allowing Baker to continue operating the center with no disruption of service, pending a trial on the merits.

B. Requirements for issuance of a preliminary injunction

Examinees should list the four requirements and describe how the evidence meets each of them: (1) likelihood of success on the merits, (2) irreparable harm to the moving party if the relief is not granted, (3) weighing of the hardship to the opposing party if relief is granted against the irreparable harm to the moving party if the relief is not granted, and (4) a consideration of whether issuance of the preliminary injunction serves the public interest. *Long*.

1. Baker is likely to succeed on the merits.

Because Baker Has Shown Continued Improvement toward Complete Compliance with the Standards and Because FDCF Has Permitted Her to Continue to Operate despite Prior Deficiencies, She Is Likely to Succeed on the Merits.

The moving party need not meet the standard of proof required at trial on the merits but must raise a fair question regarding the existence of the claimed right and the relief he or she will be entitled to if successful at trial on the complaint for permanent relief. *Lang*. The following facts support an argument that granting the injunction is appropriate:

- Baker is licensed to operate the Little Tots Child Care Center. FCCCA § 3(a).
- Although Baker has been warned of deficiencies, she has shown steady improvement since the inspections began. Baker has improved from having incomplete forms on 37 children to now having only 5 incomplete forms.
- Baker has completed background checks on all but 2 of the 19 staff members. The failure to conduct a background check on Teacher Anders pre-dates Baker's ownership of the center.
- The center has been able to expand its enrollment, thus serving even more children.
- The over-enrollment in the one 2-year-old room will be alleviated in one week.
- No actual harm has occurred to any child.
- The child care program at Little Tots is so good that the State University Early Learning Center sends students to Little Tots to observe. One parent will testify to how his child improved while attending the center.
- The Act envisions time for improvements when it requires that notice be given to an owner before a revocation. FCCCA § 3(f).
- The Act does not require revocation. It also provides for fines as an enforcement tool. While Baker has no desire to be fined, she may argue that fining her and allowing her to continue to operate and to continue to improve meets the Act's requirements. *Id.*
- Permitting Little Tots to continue to operate pending the hearing on the merits maintains the status quo.

Examinees should anticipate that FDCF will argue that each of the three inspections revealed critical violations, including incomplete enrollment forms, failure to complete background checks on employees, inadequate staffing of the center, and a failure to ensure compliance with one child's health needs (Child A's dairy allergy).

Examinees should rebut FDCF's arguments by arguing that the standard for a preliminary injunction is not success on the merits, but *likelihood* of success, defined as raising a fair question regarding the claimed right. *See Long*. The movant need not prove her case now; that will come at trial. At this stage, examinees should argue that Baker has raised a fair question by showing continual improvement, the likelihood of total compliance if given a few more weeks, and the availability of penalties short of license revocation (e.g., a fine). They may also argue that FDCF has permitted the center to continue operating for the past seven months, despite some deficiencies. This implies that the cited deficiencies are not that critical or serious.

2. **Baker will suffer irreparable harms if the injunction is not granted.**

If Her License Is Revoked, Baker Will Lose the Ability to Operate the Child Care Center, Lose the Grant that Allows Her to Serve Low-Income Parents, and Suffer Damage to Her Reputation, All of Which Are Irreparable Harms.

An alleged harm or injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard. In other words, if the moving party can be compensated for the wrong suffered through damages, the movant has not suffered an irreparable injury. *Long*. Examinees should argue that the following facts demonstrate that Baker will suffer irreparable harm:

- If Baker loses the license to operate Little Tots, she will lose her source of income and her ability to repay her loans.
- If she is forced to close, she will likely lose the government grant and, if later relicensed, may not be able to offer the same services she does now. It is likely that if she loses the grant, she will be unable to offer reduced fees to low-income clients.
- If the center closes, it is likely that Baker will lose clients; they will, of necessity, find another center or be forced to give up their jobs because of the unavailability of reliable child care at Little Tots. Even if she can re-open later, those clients may not return.
- Loss of the grant and the clients it attracts is not measurable by a pecuniary standard.
- Even if Baker is able to come into compliance and get relicensed, there will be damage to her reputation, which cannot be easily measured by any certain pecuniary standard.

Examinees should anticipate that FDCF will argue that the loss of income due to closure is calculable and therefore any harm can be adequately compensated by monetary damages. In *Long*, however, the court allowed that even if damages could be awarded later, they would not compensate for the harm to the child's education. Here, examinees should respond that the loss to Baker of her reputation is very hard to measure, if it can be measured at all. Should she be able to obtain a new license and re-open, it is more than likely that she will have lost clients, due to the loss of the grant and/or loss of her reputation, or due to parents' need to find another child care center in the meantime.

3. **Balance of benefits and hardships**

The Hardship to the Public from Permitting the Center to Continue to Operate Is Outweighed by the Harm to Baker of Losing the License and to the Parents Who Will Have No Place to Care for Their Children.

The court must weigh the benefits of granting the injunction against the possible hardships to the opposing party. Put another way, the court must determine whether greater injury would result from refusing to grant the relief sought than from granting it. Examinees should argue that the benefits to Baker and others of granting the injunction (and allowing the center to stay open) are greater than the potential hardships if the injunction is not granted and Little Tots is closed.

- If the injunction is granted, there are hardships to the public, to the children whom the Act is designed to protect, and to their parents as well. Examinees will need to identify these hardships by extrapolating from several provisions of the Fr. Admin. Code. These include the following:
  - Danger of children being kidnapped or picked up by an estranged parent or relative who is prohibited from being with the child because of incomplete enrollment forms. 34 Fr. Admin. Code § 3.06(b)(8).
  - Danger of children being harmed due to inadequate staffing. *Id.* § 3.13(d).
  - Danger of children being harmed by a staff person with a violent history or a history of sexual abuse because of failure to conduct background checks on staff. *Id.* § 3.12(a).
  - Danger that a child will become ill or even die due to failure to ensure that dietary restrictions are observed and that the staff members know and follow these procedures. *Id.* § 3.37(g).
- In addition, if Little Tots is allowed to remain open during this time, it sends a message to other child care center operators that they can violate critical FDCF standards without repercussions.

- There is no requirement that FDCF wait until actual harm has occurred to revoke a child care center's license.
- On the other hand, if the injunction is not granted, Baker will suffer irreparable harm as noted above. Additionally, if the injunction is not granted and the license is revoked,
  - 19 employees will lose their jobs;
  - parents of all enrolled children will have to find alternative child care or will have to cease employment; and
  - all enrolled children are likely to receive inferior care.

Examinees should expect FDCF to stress the risks to the children and the public as listed above and to argue that these hardships outweigh the benefits of granting the injunction and keeping the child care center open. In response, examinees should concede that there are hardships that will be suffered by the public but should rely on *Lang* to argue that the grant of an injunction does not require assurance that there will be no hardships, only that any hardships be outweighed by the harm if the relief is not granted.

In *Lang*, the court recognized that the school district would be harmed but balanced those harms against the harm to the child if he could not attend school with his service dog. Likewise, examinees should argue that the benefits of granting the injunction outweigh the harms if it is not granted. If the injunction is not granted, the center will close and parents will be without this resource for their children. Although Little Tots is not in perfect compliance with FDCF standards, it is showing continual improvement in meeting those standards. Given that the deficiencies are ones that FDCF permitted to continue after prior inspections, the deficiencies must not be so dangerous as to outweigh the benefits of keeping Little Tots open.

4. Public interest

Granting the Injunction to Restrain FDCF from Revoking Little Tots's License Serves the Public Interest because Low-Income Parents Will Continue to Have a Place to Care for Their Children While They Work.

With respect to the fourth requirement for obtaining injunctive relief, examinees should argue that issuance of the preliminary injunction serves the public interest.

- The Franklin legislature found that there was a need for affordable and safe child care centers for the care of preschool-age children, especially in underserved and economically depressed communities. Fr. Child Care Center Act § 1.
- Little Tots Child Care Center fulfills the needs identified by the legislature by providing low-cost care for the preschool-age children of working parents. It is the only low-cost center in the area. Granting the injunction will permit Little Tots to continue to meet this stated public purpose.

- Little Tots serves parents whose work schedules begin early or end late and who are low-income workers.
- Unless the injunction is granted and Little Tots stays open, the children are likely to be left with relatives who may not have the resources to care for them. The children are likely to be safer at Little Tots than elsewhere. Keeping the center open fulfills the legislative purpose of ensuring the safety and well-being of preschool-age children whose parents work.
- Some parents may be forced to quit working to stay home with their children. That option is likely unaffordable for these working-class parents. This will lead to more unemployment and hardship.
- None of the inspections revealed violations related to the center's program, another critical standard, so the court can infer that the children are being well cared for. In fact, the program of Little Tots is of such good quality that the State University Early Learning Center has sent its students to observe it.

Examinees should acknowledge that the legislature authorized the FDCF director to establish standards and authorized the director to revoke the license of a child care center that fails to meet the critical standards. License revocation is the mechanism that the legislature provided to ensure the safety and well-being of the children. Examinees should anticipate that FDCF will argue that, given the deficiencies at Little Tots over seven months, the children's safety is at risk.

In response, examinees should argue that FDCF, by providing time for improvements, has already conceded that the risk of harm did not require immediate revocation. Moreover, allowing for improvements is important and required under the Act. Baker has shown continued improvement and, with a few more weeks, is likely to meet all the standards. The harms to the community in closing Little Tots now would be great and must be balanced against completing the last few steps to be in total compliance with the FDCF standards.

February 2019
MPT-2 Point Sheet:
In re Remick

In re Remick

DRAFTERS' POINT SHEET

In this performance test, the client, Andrew Remick, is considering taking legal action against a motorist, Larry Dunbar, who attempted to help Remick when his car stalled on a highway. Dunbar was jump-starting Remick's car, which was stopped on the road at dusk without its hazard lights on, when another motorist (Marsha Gibson) drove around the bend and rear-ended Remick's car. Remick was in the backseat of his car nursing a sprained ankle when the collision occurred. The force of the collision threw Remick against the back of the driver's seat, and he sustained a concussion, dislocated shoulder, and broken arm. The primary inquiry is whether Dunbar, a "Good Samaritan" who offered to assist Remick, owed Remick an affirmative duty of care under the circumstances to protect Remick and his car from being hit by another motorist. If so, and if Dunbar breached that duty and Remick can also show causation and resulting damage, then Remick can pursue a negligence action against Dunbar.

The File contains the instructional memorandum from the supervising attorney, a transcript of the client interview, and a memorandum from the firm's private investigator. The Library contains excerpts from the Restatement (Third) of Torts and three Franklin cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

Examinees' task is to draft an objective memorandum analyzing and evaluating whether Remick has a viable negligence claim against Dunbar under the alternatives set forth in the Restatement (Third) of Torts (also known as the "affirmative duty" or "Good Samaritan" doctrine). In doing so, examinees should discuss the strengths and weaknesses of each alternative. No specific formatting guidelines are provided. However, examinees are instructed not to prepare a separate statement of facts but to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analysis.

II. LEGAL AUTHORITY

The following points, which examinees should apply in formulating their analysis, emerge from the Restatement and cases in the Library:

- A cause of action for negligence requires a showing of four elements: (1) duty: a legal obligation requiring the actor to conform to a certain standard of conduct; (2) breach of duty: unreasonable conduct in light of foreseeable risks of harm; (3) causation: a reasonably close causal connection between the actor's conduct and the resulting harm; and (4) damages, including at least one of the following: lost wages, pain and suffering, medical expenses, or property loss or damage. *Rivera v. McCann* (Fr. Ct. App. 2015) (citing *Fisher v. Brown* (Fr. Sup. Ct. 1998)).

- Whether a duty exists is usually, but not always exclusively, a question of law. *Id.*
- In some circumstances, the question of whether a duty arises depends on the existence of particular facts. *See Boxer v. Shaw* (Fr. Ct. App. 2017).
- An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. *Id.*
- The common law ordinarily imposes no duty on a person to act, however, where an act is voluntarily undertaken, the actor assumes the duty to use due care under the Good Samaritan doctrine set forth in Restatement §§ 42 and 44, which is followed in Franklin. *See Thomas v. Baytown Golf Course* (Fr. Ct. App. 2016), *Boxer*, and *Weiss*.
- Restatement § 42 provides that an actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other is subject to liability for bodily harm caused to the other by the actor's failure to exercise due care in the performance of the undertaking or by the other's reliance upon the undertaking. *See Weiss*.
- Comment c to § 42 provides that the duty is one of reasonable care, and it may be breached either by an act of commission (*misfeasance*) or by an act of omission (*nonfeasance*).
- An undertaking occurs when an actor voluntarily renders a service on behalf of another and the actor knows that the undertaking serves to reduce the risk of harm to another, or the circumstances would lead a reasonable person to the same conclusion. Restatement (Third) of Torts § 42, comment d.
- When the underlying facts are in dispute, the question of whether a duty exists must be submitted to the fact finder. *See Boxer*.
- Section 44 imposes an affirmative duty on an actor who takes charge of another who is "imperiled" and "helpless or unable to protect himself or herself" at the time. The major difference between the two sections is the requirement in § 44 that the other person be in an imperiled, helpless position. *Thomas*.
- Section 44 provides that an actor who, despite no duty to do so, takes charge of another who reasonably appears to be imperiled and helpless or unable to protect himself or herself is subject to liability for bodily harm caused to the person by the actor's failure to exercise reasonable care while the other is within the actor's charge.
- Section 44 applies "whenever a rescuer takes charge of another who is imperiled and incapable of taking adequate care." Restatement (Third) of Torts § 44, comment g.
- Section 44 applies equally where one is rendered helpless by his or her own conduct (including intoxication), by the tortious or innocent conduct of others, or by a force of nature. § 44, comment g. The rule, however, requires that the rescuer take charge of the helpless individual with the intent of providing assistance in confronting the then-existing peril.

- The determination of whether an individual is "imperiled" and "helpless" is context-specific. *Thomas*. So, for example, a person who is drunk in a chair at home may not be imperiled and helpless, whereas that same person behind the wheel of a car would be. *Id.*
- Where a plaintiff's complaint states a cause of action for negligence based on the Good Samaritan doctrine and alleges sufficient facts to raise a factual issue regarding whether the defendant owed the plaintiff a duty of care under the circumstances, the court will not, as a matter of law, preclude the application of § 44 to the defendant. *Weiss; Thomas*.
- Conversely, where the plaintiff fails to show that the defendant owed a duty to the plaintiff by assuming an obligation or intending to render services to the plaintiff, as was the case in *Boxer*, the plaintiff's case will fail. *See Boxer*.
- In addition to duty and breach, the remaining two elements of a cause of action for negligence must also be demonstrated—*i.e.*, causation and damages.
- As to the element of causation, the inquiry is whether the defendant's breach of duty is sufficiently causally related to the resulting injury to the plaintiff. *See Weiss*.
- The standard for damages is whether the plaintiff suffered losses such as pain and suffering, loss of wages, or present and future medical expenses. *Id.*

III. ANALYSIS

Examinees' work product should include a discussion of the facts, although it should not contain a separate statement of facts. The following analysis is organized according to the four required elements for stating a negligence claim, but examinees could organize their analysis so as to address the requirements of the Restatement/Good Samaritan doctrine first, followed by a discussion of the four elements for a negligence claim using the Restatement-based duty.

A. Whether Dunbar Owed a Duty of Care to Remick

- The general rule of thumb is that a person owes no duty to assist a person in need, in the absence of a special relationship or special circumstance. *Boxer*.
- However, if a person who owes no duty nonetheless offers to assist another in need, the person is liable to the other for physical harm resulting from the person's failure to exercise reasonable care if the person increases the risk of such harm or the harm is suffered because of the other's reliance on the person. Restatement (Third) of Torts § 42.
- Moreover, if the person "takes charge" of another who is "imperiled" and "helpless," the person also faces liability under Restatement § 44 for bodily harm caused by the person's failure to exercise reasonable care or secure the safety of the other person.
- Because the two Restatement sections involve similar duties, examinees will likely either analyze the applicability of both sections together under their duty/breach

analysis, or fully analyze the applicability of § 42 and then focus their analysis of § 44 on the specific imperiled/helplessness feature of that section without repeating the portions of their § 42 analysis that apply equally to § 44. Either approach is fine, as long as examinees demonstrate an understanding of the Good Samaritan doctrine and the applicability of § 44 to situations where the assisted person is helpless.

- The facts in the File (specifically, the client interview transcript) indicate that Dunbar stopped to help Remick, although he was not required to offer assistance, and that he proceeded to troubleshoot and try to fix Remick's stalled car.
- Stopping to help a stranded, incapacitated driver in a remote location is a situation that Dunbar or any reasonable person would understand as helping to reduce the risk of harm to that person. *See* § 42, comment d. Furthermore, because of Remick's incapacitation and Dunbar's experience as a mechanic, it is clear that Remick relied upon Dunbar to assist him. Thus, Dunbar could be found to have owed a duty to Remick under both prongs (a) and (b) of § 42.
- When Remick expressed concern about the fact that it was getting dark and his car was still stalled on the road, Dunbar failed to take any action to protect the car or Remick, who was inside the car, against the possibility of a collision with a third vehicle.
- In *Weiss* and *Thomas*, the court held that §§ 42 and 44 apply to laypersons such as homeowners and motorists who attempt to assist others who are incapacitated.
- Here, a court would likely conclude that Dunbar assumed a similar duty with regard to Remick.
- A court would also likely conclude that Restatement § 44 applies because Remick was "imperiled" and "helpless," and Dunbar "took charge" of him.
- The determination whether an individual is "imperiled" and "helpless" must be made within the context of each case, and comment g to § 44 makes clear that § 44 applies regardless of whether a person's helplessness is self-inflicted (such as was the case in *Weiss* and *Thomas*, where the assisted person had drunk too much) or the result of other causes.
- Here, the context indicates that Remick was indeed "imperiled," "helpless," and "unable adequately to protect himself" due to his ankle injury (arguably a self-inflicted incapacitation not unlike the situations in *Weiss* and *Thomas*, although of a different nature—those cases involved mental incapacitation whereas Remick's situation involves physical incapacitation). Restatement (Third) of Torts § 44, comments c and g.
- Remick's situation is distinguishable from that of the decedent in the *Boxer* case because in *Boxer*, the decedent was not "helpless" because he had no mental

or physical impairment (his blood alcohol level was below the legal limit and his divorce-related stress was not incapacitating).

- The facts further indicate that Dunbar "took charge" of the situation (and Remick) by examining and working on Remick's car while Remick waited in his car with an ankle injury that made him essentially immobile. *Cf. Bixter* (defendant did not "take charge" of able-bodied decedent simply by offering to drive decedent to mutually agreed-upon social activities).

B. Whether Dunbar Breached a Duty of Care Owed to Remick

- Dunbar can be held liable for attempting to assist Remick but failing to adequately secure and protect Remick or his car against an accident.
- The situation here is not unlike that in *Sargent v. Howard* (Fr. Ct. App. 2013) (cited in *Bixter*), where the court held that a Good Samaritan driver could be held liable for injuries sustained by an ill passenger who was attacked by a stranger after being left at night in an unlocked, running vehicle while the driver used a convenience store restroom.
- Like the plaintiff in *Sargent*, who was left in an unlocked car and vulnerable to attack, Remick was essentially a "sitting duck" for any oncoming car.
- Once Remick accepted Dunbar's help, Dunbar was obligated to use reasonable care under the circumstances. As an experienced driver, Dunbar should have been aware of the hazard light features on his own truck. As a former mechanic, Dunbar further should have understood the risk of leaving Remick's disabled and unlit car on the road.
- Reasonable care would have included either moving the car to the side of the road or at least turning Dunbar's own truck lights or hazard lights on and/or using Remick's emergency flares, so that approaching motorists would have been able to see Remick's car and avoid hitting it. Dunbar's failure to do so constitutes an "act of omission (nonfeasance)," resulting in a breach of duty under § 42. *See* § 42, comment c.
- Similarly, an argument can be made that Dunbar took charge of Remick and his car knowing that Remick was injured and helpless under the circumstances. Dunbar's failure to move the car to the side of the road or to use the hazard lights on his truck or the emergency flares to make Remick's car more noticeable to oncoming traffic amounted to a breach of duty under § 44.

C. Whether There Is a Reasonably Close Causal Connection Between Dunbar's Conduct and the Resulting Injury to Remick

- The police report states that Marsha Gibson, the motorist who rear-ended Remick's car, was driving under the speed limit at the time of the collision, that she did not see Remick's unlit car until she was about 40 feet away because it was getting dark and

his car was stopped just beyond a bend in the road, and that she tried to stop her car before hitting Remick's but could not slow down enough to avoid a collision. *See* investigator's memo.

- These facts are corroborated by other facts in the police report summarized in the investigator's memo; for instance, skid marks measured at the scene of the accident indicate that Gibson immediately applied the brakes on her vehicle but was unable to avoid hitting Remick's car.
- If Remick's car had been on the shoulder, Gibson likely would not have rear-ended it.
- Likewise, it is reasonable to conclude that if the hazard lights on Dunbar's truck had been flashing, Gibson likely would have seen Remick's car sooner and might have been able to brake in time to avoid a collision. *Cf. Thomas* (if Good Samaritan golfer had not said he would make sure that his golfing partner got home safely, defendant golf course might have taken steps to prevent fatal car accident).
- Based on the facts presented and reasonable inferences to be drawn therefrom, Remick can likely demonstrate the necessary causal connection between Dunbar's breach of duty and Remick's resulting injuries and car damage.
- Section 42 requires that an actor's undertaking increase the risk of harm to another. Astute examinees may note that Dunbar could argue that Remick would have been in the same position if Dunbar hadn't attempted to help him (*i.e.*, stranded in his car on the highway), and that therefore Dunbar's actions or inactions did not cause Remick any harm or increase Remick's risk of harm because Gibson would have rear-ended Remick's car anyway.
- The problem with that argument is that it assumes Remick would have remained in his unlit car even if Dunbar hadn't come along and offered to help him.
- The concern Remick expressed to Dunbar about the fact that it was getting dark and his car was still stalled on the road suggests that he understood the risk of leaving the car there. Moreover, Remick's awareness of the risk suggests that, had Dunbar not stopped, Remick would have managed to get out of his car and wait on the shoulder of the road for help. Had that been the case, then even if Gibson had rear-ended Remick's car, Remick would have been no worse for wear physically, although his car would still have sustained damage. However, Dunbar, an experienced mechanic, "told [Remick] not to worry because [Dunbar] thought he could get the car started pretty quickly. [Remick] told [Dunbar] that [Remick] had emergency flares in the trunk; [Dunbar] said not to worry." (Client interview.) Remick relied upon Dunbar's expertise and his assurances that he could fix the mechanical issue with the car "pretty quickly."

- All in all, the facts favor a finding of causation, and Remick could likely demonstrate that there was a "reasonable causal connection" between Dunbar's conduct and Remick's resulting injury and that, as required by § 42, Dunbar increased Remick's risk of harm beyond the risk Remick would have faced had Dunbar not stopped to help him.

D. Whether Remick Sustained Actual Loss or Damage Resulting from Dunbar's Actions

- As evidenced in the client interview transcript and the police report summary contained in the investigator's memo, Remick sustained serious injuries as a result of the collision, including a concussion, dislocated shoulder, and broken arm.
- He will likely need surgery on his shoulder, he cannot use his left arm for at least a few more weeks, and he faces "several months" of rehabilitation due to his injuries.
- And, while only limited information is provided, it is clear from the client interview transcript that his ongoing injuries interfere with his ability to work and operate his landscaping business.
- His car also needs approximately $4,500 in repairs.
- Examinees should conclude from these facts that Remick has satisfied the fourth and final requirement for stating a negligence claim and that his damages include both serious personal injury and significant property damage.

IV. CONCLUSION

Examinees should conclude that Remick *can* assert a viable cause of action for negligence against Dunbar under both § 42 and § 44 of the Restatement (Third) of Torts. Remick was stranded in a disabled vehicle, with an incapacitating ankle injury that made him "imperiled" and "helpless" under the circumstances. Dunbar offered, voluntarily, to help Remick, thereby assuming a duty to protect Remick and his car under § 42. Because Remick was "imperiled" and "helpless" within the meaning of § 44, Dunbar also owed Remick a duty to exercise reasonable care to secure Remick's safety, but he failed to do so. Dunbar breached his duty to Remick, and Remick suffered a concussion, dislocated shoulder, and broken arm as a result of that breach. Because the facts establish all four elements for a negligence claim, Remick may proceed with a lawsuit against Dunbar.

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THE MEE®
MULTISTATE ESSAY EXAMINATION

February 2019
MEE Questions and Analyses

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Contents

Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the February 2019 MEE. (In the actual test, the questions are simply numbered rather than being identified by area of law.) The instructions for the test appear on page iii.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, identified by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Civil Procedure question on the February 2019 MEE tested the following areas from the Civil Procedure outline: I.A. Jurisdiction and venue—Federal subject matter jurisdiction (federal question, diversity, supplemental, and removal); and B. Personal jurisdiction.

For more information about the MEE, including subject matter outlines, visit the NCBE website at www.ncbex.org.

Description of the MEE

The MEE consists of six 30-minute questions and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. Areas of law that may be covered on the MEE include the following: Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Civil Procedure, Conflict of Laws, Constitutional Law, Contracts (including Article 2 [Sales] of the Uniform Commercial Code), Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates (Decedents' Estates, Trusts and Future Interests), and Article 9 (Secured Transactions) of the Uniform Commercial Code. Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation, (2) separate material which is relevant from that which is not, (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition, and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

Instructions

The back cover of each test booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.
>
> You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.
>
> If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.
>
> Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.
>
> Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.
>
> Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.
>
> Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

February 2019 MEE Questions

Torts

Secured Transactions

Agency & Partnership

Civil Procedure

Trusts & Future Interests

Criminal Law & Procedure

TORTS QUESTION

One year ago, a man was injured when the car in which he and a woman were traveling slid off an icy highway during a winter storm and overturned. At the time of the accident, the woman was driving the car. The man was sitting in the front passenger seat, wearing his seat belt. The woman was driving 40 mph at the time of the accident, although the posted speed limit was 50 mph.

The man and the woman were rushed to a local hospital in its ambulance. There, hospital surgeons performed emergency surgery on the man. The man remained in the hospital for 10 days following his admission. Numerous medical instruments were used during his surgery and subsequent hospitalization, including needles, clamps, and surgical tools. However, he did not receive a blood transfusion or any blood products.

Three days after the man was released from the hospital, he developed a fever and visited his personal physician, who is not affiliated with the hospital. The physician ordered routine blood tests. The tests revealed that the man had a serious infection that is transmitted in nearly all cases through exposure to either contaminated blood products or improperly sterilized medical instruments (needles, clamps, surgical tools, etc.) that come into contact with a patient's blood. There are, however, other possible sources of the infection in a hospital environment, such as a failure of staff to follow proper handwashing techniques to avoid transmitting infection from one patient to another and staff failure to properly identify and discard certain used medical instruments that cannot safely be sterilized.

Infections occurring in individuals who have not received a blood product and have not been hospitalized during the period of likely exposure are possible but rare. The physician told the man that he "must have contracted this infection at the hospital" because the period between infection and symptom development is 10 to 13 days and the man was a patient at the hospital during the entire relevant period. The physician also stated that "at hospitals that have adopted medical-instrument sterilization procedures recommended by experts, cases of this infection have been almost completely eliminated." The man has no history of intravenous drug use, and he did not receive any medical treatment for several months before his hospital stay. All sterilization procedures at the hospital are performed by hospital employees. However, the particular sterilization procedure used while the man was hospitalized cannot be determined because, while the hospital now uses the sterilization procedure recommended by experts, there is no record of when it started using that procedure.

The man has sued the woman and the hospital, alleging negligence. Neither defendant is judgment-proof, and this jurisdiction has no automobile-guest statute. The parties have stipulated that the man's damages for the injuries he suffered in the accident are $100,000 and his damages from the infection he contracted are $250,000.

1. Could a court properly find that the woman was negligent even though she was driving below the posted speed limit? Explain.

2. Could a court properly find that the woman is liable for the man's damages resulting from the infection? Explain.

3. Could a court properly find that the hospital is liable for the man's damages resulting from the infection? Explain.

4. If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident? Explain.

SECURED TRANSACTIONS QUESTION

A company is in the business of manufacturing and selling stereo equipment. Several months ago, the company borrowed money from a bank, to be repaid by the company in monthly installments. The loan agreement, which was signed by the company's owner, provided that, to secure the company's obligation to repay the loan, the company granted the bank a security interest in "all personal property" owned by the company. Also that day, under an oral agreement with the company's owner (who had full authority to speak on behalf of the company), the bank took possession of one of the most valuable items of the company's property—an original Edison gramophone that the company had acquired because it was the earliest precursor of the company's digital music players—as part of the collateral for the loan. The bank properly filed a financing statement in the appropriate filing office, listing the company as debtor and, in the space for the indication of collateral, listing only "all personal property."

Since borrowing the money, the company has run into various financial troubles. It has missed some loan payments to the bank and recently lost a lawsuit, resulting in a large judgment against the company. Last month, the judgment creditor obtained a judicial lien on the gramophone.

Last week, the bank notified the company that it was in default under the loan agreement. Without giving advance notice to the company, the bank sold the gramophone to an antiques collector in a commercially reasonable manner. The judgment creditor has learned about the sale of the gramophone and asserts that he had a superior claim to it.

The sale of the gramophone did not generate enough money to satisfy the company's obligation to the bank. The bank would like to seize some of the company's other property in which the bank has an enforceable security interest.

1. Does the company have any claim against the bank with respect to the sale of the gramophone? Explain.
2. As between the bank and the judgment creditor, who had a superior claim to the gramophone? Explain.
3. Does the bank have an enforceable security interest in any personal property of the company other than the gramophone? Explain.

AGENCY & PARTNERSHIP QUESTION

Five years ago, three radiologists—Carol, Jean, and Pat—opened a radiology practice together. They agreed to call their business "Radiology Services," to split the profits equally, and to run the practice together in a manner that would be competitive. Toward that end, they purchased state-of-the-art radiology imaging equipment comparable to that of other radiology practices in the community.

Shortly after opening the practice, Carol, Jean, and Pat retained an attorney to organize the practice as a limited liability company. The attorney prepared all the necessary documents and forwarded the documents to Carol, Jean, and Pat for signature. However, they were so involved in their radiology practice that they forgot to sign the documents, and they have never done so.

Four months ago, Carol suggested to Jean and Pat that the practice replace some of the imaging equipment. Jean was worried about overspending on imaging equipment, but she did not express her concern to Carol and Pat.

Three months ago, Carol, without discussing the matter further with either Jean or Pat or obtaining their consent, purchased for the practice a $400,000 state-of-the-art imaging machine like those recently acquired by other radiology practices in the community.

After the purchase but prior to delivery, Jean learned what Carol had done and was furious. Jean did not believe the practice could afford such an expensive machine. When Jean confronted Carol, Carol said, "Too bad, it's a done deal—get over it." At that, Jean responded, "That's it. I've had enough. This machine was purchased without my consent. It's a terrible idea. I'm out of here and never coming back. Just give me my share of the value of the practice." Carol responded, "Fine with me." Carol and Pat subsequently agreed to continue their participation in Radiology Services without Jean.

Radiology Services is in a jurisdiction that has adopted both the Revised Uniform Partnership Act (1997, as amended) and the Uniform Limited Liability Company Act (2006, as amended).

1. What type of business entity is Radiology Services? Explain.
2. Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat? Explain.
3. Did Jean's statements to Carol constitute a withdrawal from Radiology Services? Explain.
4. Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice? Explain.

CIVIL PROCEDURE QUESTION

An airline is incorporated in State A, where its corporate headquarters are located. The facility where it receives and processes online and telephone reservation requests is located in State B. It employs 150 people at that facility. The airline's base of physical operations, including its transport hub and major maintenance facility, is in State C, where more than 12,000 of its 15,000 employees are located. The airline serves States A and C but not State B.

In August, a woman who lived in State C called the reservation center in State B to obtain a round-trip ticket for the woman to fly between State C and State A in early September.

In early September, the woman used the ticket to fly to State A. The purpose of her trip was to hunt for an apartment in State A, where she was planning to start working at a new job that was set to begin in December. The woman found an apartment and signed an agreement to rent the apartment for one year, starting on December 1.

On the woman's return flight from State A to State C, a mechanical failure forced the plane to make an emergency landing in State A. The woman suffered serious and permanent injuries during the emergency landing and was hospitalized for three weeks in State A. Upon leaving the hospital, she returned to her home in State C. Because of the injuries she suffered, the woman has been unable to work, and she has received an indefinite deferral of the starting date for her job in State A. She continues to live in State C, where she has lived her entire life, although she hopes one day soon to move to the apartment in State A and begin working at her new job.

The woman has retained an attorney, who recommended filing a personal injury claim against the airline in State B because of the larger awards that State B juries tend to give in such cases. Accordingly, the woman sued the airline in federal court in State B, making a state-law tort claim for damages in excess of $1 million for the injuries she suffered during the plane's emergency landing.

The airline promptly filed a motion to dismiss for lack of subject-matter and personal jurisdiction.

State B's long-arm statute allows its courts to exercise personal jurisdiction to "the maximum extent allowed by the Fourteenth Amendment of the United States Constitution."

How should the federal district court rule on the motion to dismiss? Explain.

TRUSTS & FUTURE INTERESTS QUESTION

Eight years ago, a settlor created a $300,000 irrevocable trust. The settlor's brother is the sole trustee of the trust. The trust's primary beneficiaries are the settlor's son and daughter. The trust instrument provides, in relevant part:

> During the term of this trust, the trustee shall pay to and between my two children so much, if any, of trust income and principal as he deems advisable, in his sole discretion, for each child's support. Upon the death of the survivor of my children, the trustee shall distribute any remaining undistributed trust principal and income equally among my surviving grandchildren.

The trust contains a spendthrift clause that prohibits the voluntary assignment of a beneficiary's interest and does not allow a beneficiary's creditors to reach that interest.

Two months after creating the trust, the settlor died. Both the settlor's son, now age 35, and the settlor's daughter, now age 32, survived the settlor and are still alive. The settlor's son has three living children, now 9, 11, and 14 years of age. These children currently live with their mother, from whom the settlor's son was divorced seven years ago. The settlor's daughter is unmarried and has no children. Both the son (employed as a waiter) and the daughter (employed as a bookkeeper) have earned, on average, less than $35,000 per year during the past seven years.

Over the past eight years, the son has incurred and has not paid the following debts:

(a) $10,000 to a hospital for the son's emergency-room care.

(b) $35,000 to his former wife in unpaid, judicially ordered child support.

(c) $5,000 to a friend for repayment of a loan, five years ago, to purchase a high-end computer-gaming system for recreational use.

Repayment of the debt to the friend was due last year, but the son defaulted on the loan.

During the first year of the trust, the trustee distributed $9,000 of trust income to each of the settlor's two children for their support. Thereafter, relations between the settlor's son and the trustee deteriorated. After the son and his wife divorced, the trustee frequently told others, behind the son's back and without any direct basis, that the son was an "adulterer" and a "terrible father." The trustee often referred to the son as a "bum," and he told the settlor's daughter, without any explanation, "Your brother is rude to me."

Over the last seven years, although the son's and daughter's financial needs were similar, the trustee has distributed $80,000 from trust income and principal to the settlor's daughter and nothing to the settlor's son, despite the son's repeated requests for trust distributions to help him pay his hospital bill, child support, and loan.

1. Given the terms of the trust the settlor created, could the trustee have properly distributed trust assets to the son to enable him to pay (a) his hospital bill, (b) child support, and (c) the loan to purchase the computer-gaming system? Explain.

2. Did the trustee abuse his discretion in refusing to make any distributions to the son during the past seven years? Explain.

3. In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets? Explain.

CRIMINAL LAW & PROCEDURE QUESTION

One evening, Ben received a visit from his neighbor. Hanging on Ben's living room wall was a painting by a famous artist. "I love that artist," the neighbor said. "I've collected several of her paintings." Ben remarked that the famous artist was his ex-wife's mother and that whenever his new girlfriend visited, the fact that the painting still hung in his house made her jealous. The neighbor said, "I have a solution. Why don't you give the painting to me for safekeeping? I have an unsigned print by the same artist that you can hang in its place. The print is not in the artist's usual style, so your girlfriend will not get jealous and your living room will still have great art."

Ben thought this was a good idea. He and his neighbor carried the painting to the neighbor's house and hung it in the neighbor's dining room. Ben then took the neighbor's unsigned print home and hung it in his living room.

The next day, Ben decided that he really didn't like the print, and he took it off the wall. Then, around 10:00 p.m., he decided to retrieve the painting from his neighbor.

Ben went to his neighbor's house and knocked on the door, but there was no answer. Just as he was about to leave, he noticed that a ground-floor window was ajar. Ben pushed the window fully open and began to climb into the house to retrieve the painting. The neighbor, who had been asleep upstairs, was awakened by the noise and ran downstairs to find Ben halfway through the window. The neighbor became enraged. Ben tried to explain, but the neighbor would not stop yelling. Ben decided that it would be better to return to his home and retrieve the painting later, after the neighbor had a chance to cool off. But the neighbor followed him outside and across the lawn, yelling, "How dare you sneak into my house!" The yelling attracted the attention of a police officer who was passing in her patrol car. The officer stopped to investigate, and Ben was arrested, questioned, and released.

Two days later, the neighbor returned the painting to Ben, saying "Here's your painting. Give me back the print that I loaned you and we'll forget the whole thing." However, the previous day Ben had been so angry with the neighbor about his arrest that he had contacted an art dealer and had sold her the print. Ben did not tell the art dealer that the unsigned print was by the famous artist. Ben simply offered to sell the print at a very low price and told the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all." Although the art dealer often investigated the ownership history of her purchases, she bought the print without further discussion. An hour after the sale, the art dealer contacted a foreign art collector famously uninterested in exploring the ownership history of his acquisitions, and sold him the print for 10 times what she had paid for it.

The prosecutor is considering bringing the following charges: (i) a charge of burglary against Ben in connection with the incident at the neighbor's house, (ii) a charge of larceny or embezzlement against Ben for his actions involving the unsigned print, and (iii) a charge of receiving stolen property against the art dealer for her actions involving the print.

The jurisdiction where these events occurred has a criminal code that defines burglary, larceny, embezzlement, and receiving stolen property in a manner consistent with traditional definitions of these crimes.

With what crimes listed above, if any, should Ben and the art dealer be charged? Explain.

February 2019
MEE Analyses

Torts

Secured Transactions

Agency & Partnership

Civil Procedure

Trusts & Future Interests

Criminal Law & Procedure

TORTS ANALYSIS

TOR (II.B.2., C., D.2., D.3.)

ANALYSIS

Legal Problems:

(1) Could a court properly find that the woman was negligent even though she was driving below the speed limit?

(2) Could a court properly find that the woman is liable for the man's damages resulting from the infection?

(3) Could a court properly find that the hospital is liable for the man's damages resulting from the infection?

(4) If a court found that both the woman's negligence and the hospital's negligence caused the man's infection, could the woman's liability be limited to $100,000 for injuries the man suffered in the accident?

DISCUSSION

Summary

A court could properly find that the woman was negligent despite the fact that she was driving at a speed lower than the posted limit if it concludes that her conduct was unreasonable under the circumstances. Given the icy road conditions, a court could find that her conduct was unreasonable.

Because exposure to either negligent or non-negligent medical treatment is a foreseeable risk of negligent driving, the woman could be found liable for the damages arising from the infection if the court concludes that the man contracted the infection through the hospital's conduct.

Although the man cannot show when or how he contracted the infection, under the doctrine of res ipsa loquitur the man could recover damages from the hospital if he can show that the harm he suffered (the infection) does not normally occur without negligence and that other responsible causes, including his own conduct and that of third persons, are sufficiently eliminated by the evidence. Here, the evidence shows that the man was in the hospital during the entire period in which he contracted the infection, that he had no other known means of exposure, and that the risk of infection can be almost eliminated through the hospital's use of recommended infection-control procedures. A court thus could properly rely on the res ipsa loquitur doctrine to find the hospital liable.

If the court found that the negligence of both the woman and the hospital caused the infection, the woman's liability must be greater than $100,000. Because the woman's negligence alone caused the car accident, she alone would be liable for the $100,000 damages for the injuries the man suffered in the accident. In addition, in joint and several liability jurisdictions, she and the

hospital together would be liable for the full amount of damages from the man's infection. Thus, her total damages for both the accident and the infection would not be limited to $100,000.

Point One (20%)

Because compliance with a statutory standard does not insulate an actor against liability for negligence, the woman could properly be found liable to the man despite the fact that she was driving below the posted speed limit.

Statutory standards typically establish the level of care necessary to avoid a finding of negligence. Thus, "an actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 14. However, an actor is negligent when he or she "does not exercise reasonable care under *all* the circumstances." *Id.* at § 3 (emphasis added). Speed limits are established for normal driving conditions, not hazardous conditions caused by poor weather. Given that the accident in which the man was injured occurred on an icy road during a winter storm, a court could find that the woman was negligent even though she was driving at a speed lower than the posted speed limit. Compliance with a statute does not establish freedom from fault. *See id.* § 16.

Point Two (20%)

Because contracting the serious infection was within the scope of the risk of negligent driving, the court could find that the woman's negligence was the proximate cause of the man's injuries sustained as a result of contracting the infection.

An actor is liable for those harms that are a foreseeable consequence of his negligence.

Courts have routinely found that subsequent medical malpractice is within the scope of the risk created by a tort defendant. "If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner." Restatement (Second) of Torts § 457. Liability typically attaches even when the medical services rendered "cause harm which is entirely different from that which the other had previously sustained . . . so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such services." *Id.* at cmt. a.

Thus, because it is foreseeable that an injured person will require hospitalization and that hospitalization will expose the injured person to other infections, the woman could be found liable for the man's damages associated with contracting the infection so long as the trier of fact concludes that the hospital is responsible, whether negligent or not, for the man's contracting the infection.

Point Three (40%)

Although the man cannot directly prove that he contracted the infection in the hospital or from a specific action by the hospital or its employees that was negligent, the hospital could be found liable under the doctrine of res ipsa loquitur because the man can show that (1) contracting the infection does not normally happen without negligence, and (2) other responsible causes are sufficiently eliminated by the evidence.

Typically, the tort plaintiff bears the burden of proof to establish the specific actions of the defendant or its employees (acting within the scope of their employment) that were negligent and caused his harm. Here, the plaintiff has no direct proof of the actions of the hospital or its employees that were negligent and that caused the infection from which he is suffering.

However, the doctrine of res ipsa loquitur permits the trier of fact to infer that the harm suffered by the plaintiff was caused by negligence of the defendant when

> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
>
> (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Restatement (Second) of Torts § 328D.

Res ipsa loquitur is commonly used in actions against medical providers when the patient suffers an unexplained injury and the evidence establishes that the risk of such an injury can be largely eliminated when reasonable care is used. If, for example, the "evidence shows that a particular adverse result of surgery is totally preventable when surgeons exercise reasonable and customary care, then res ipsa is appropriate in the patient's suit against the surgeon." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17 cmt. e; *Kambat v. St. Francis Hospital*, 678 N.E.2d 456 (N.Y. 1997).

The man should be able to show that contracting the infection is an event that normally does not occur in the absence of negligence. A plaintiff need not show that reasonable care would completely eliminate the risk, only that it "ordinarily does not occur in the absence of negligence." Restatement (Second) of Torts § 328D.

The man should also be able to show that the very likely cause of the infection is one of three possibilities: (1) improperly sterilized instruments, (2) failure of employees to follow proper handwashing techniques, or (3) reuse of medical instruments that cannot be properly sterilized. Any of these possibilities would constitute hospital negligence. Another cause that could suggest either hospital negligence or negligence by a third-party supplier is the use of contaminated blood, but that cause is eliminated by the facts. The possible causes that do not suggest hospital negligence are "rare possibilities" that occur outside the hospital setting. These possible causes

are eliminated because the man was hospitalized during the entire period of potential exposure. Thus, even though the specific cause of the infection cannot be proven, it appears that there is a very strong inference that the hospital's negligence caused the infection.

Lastly, here the hospital clearly had a duty to the man to protect him against contracting infections while hospitalized. Thus, the indicated negligence—failing to protect the man from contracting the infection—was within the scope of the hospital's duty to the man.

Based on this evidence, the court could use the res ipsa loquitur doctrine to find that the hospital is liable for the man's infection.

[NOTE: This answer sets out the res ipsa loquitur requirements from the Restatement (Second) of Torts. Jurisdictions differ as to exactly how they express the requirements of the res ipsa loquitur doctrine. One traditional variation requires that the plaintiff show three things: "(1) the accident which produced a person's injury was one which ordinarily does not happen unless someone was negligent, (2) the instrumentality or agent which caused the accident was under the exclusive control of the defendant, and (3) the circumstances indicated that the untoward event was not caused or contributed to by any act or neglect on the part of the injured person." *See, e.g., Eaton v. Eaton*, 575 A.2d 858, 863 (N.J. 1990). The Third Restatement offers another formulation: that negligence can be inferred when the accident causing harm is of a type that "ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17.

Answers relying on any of these variations should be given full credit as long as the examinee recognizes that courts interpret that variation, regardless of the specific way it sets out its requirements, "to limit the application of the res ipsa loquitur doctrine to those situations in which the defendant's negligence was more probably than not the cause of the plaintiff's injuries." *Giles v. City of New Haven*, 636 A.2d 1335 (Conn. 1994); *see also* Dan B. Dobbs et al., Torts and Compensation 190 (7th ed. 2013) ("We should expect variation in local verbalization of the rules, but always remember that a different verbalization may be intended to express substantially the same ideas.")]

[NOTE: An examinee might note that statutes in some jurisdictions restrict the use of res ipsa loquitur in medical malpractice cases. No such statute appears here, and an examinee should not receive credit for assuming such and answering accordingly. *See* Prosser, Wade, and Schwartz's Torts Cases and Materials 259 (13th ed. 2015).]

Point Four (20%)

A finding that the woman's negligence caused the car accident would mean that the woman is solely responsible for the $100,000 damages from the accident and is liable for that amount. She and the hospital together will be jointly and severally liable for the $250,000 in damages from the man's infection. Thus, the man can collect any portion, or all, of the $250,000 damages from the woman. Therefore, the woman's liability for both injuries cannot be limited to $100,000.

If the woman negligently caused the auto accident, she would be the sole proximate cause of the accident and would be liable for the $100,000 stipulated damages. She alone bears responsibility for those damages.

If the negligence of the woman and the hospital both caused the man's infection, the woman and the hospital would be jointly and severally liable for the $250,000 stipulated infection damages. Joint and several liability would be imposed for the infection damages because both the woman and the hospital have caused an indivisible injury, one of the bases of joint and several liability. Each of them is liable for the full amount of the man's damages from the infection.

Thus, because the woman is solely liable for the $100,000 of damages just from the accident and is jointly and severally liable for the foreseeable infection damages, her liability cannot be limited to $100,000.

[NOTE: The man has no obligation or need to ask the court to apportion the infection damages. He can approach either tortfeasor, or both tortfeasors, and seek total infection damages of $250,000 or a lesser amount. The man has the choice of how to apportion collection efforts between the two. The fourth call asks only whether the woman's liability could be limited to $100,000. Clearly the answer is "no" because she is liable for $250,000 as a joint tortfeasor in addition to liability for $100,000 damages from the accident. The examinee is not asked to specify how the plaintiff would apportion collection efforts between the two joint tortfeasors.

The MEE Subject Matter Outline notes that all torts questions occur in a jurisdiction that has joint and several liability with pure comparative negligence.]

SECURED TRANSACTIONS ANALYSIS

SEC (II.D., E., F.; III.B.; IV.A., B.; V.A.2., B.)

ANALYSIS

Legal Problems:

(1) May a secured party dispose of collateral after the debtor's default without first notifying the debtor?

(2) Whose rights are superior as between the rights of a secured party having possession of an item of collateral and a person who has a judicial lien on the same item?

(3) Does a security agreement describing collateral as "all personal property" create an enforceable security interest in a debtor's property?

DISCUSSION

Summary

The company has a claim against the bank with respect to the sale of the gramophone because the bank did not provide the company with advance notification of the bank's intent to dispose of the gramophone. The bank's security interest in the gramophone is superior to the judicial lien of the judgment creditor because the bank's security interest was perfected before the lien was created. The bank does not have an enforceable security interest in other property of the company because the language in the security agreement is insufficient and thus the bank's security interest is not enforceable or attached.

Point One (20%)

The company has a claim against the bank with respect to the sale of the gramophone because the bank did not send the company a notification of disposition before the sale.

After default by the debtor, a secured party may dispose of the collateral. UCC § 9-610(a). If it does so, the proceeds of that disposition will be applied first to the expenses of that process and then to the satisfaction of the debtor's obligation to the secured party. UCC § 9-615(a). Before disposing of the collateral, however, the secured party must send the debtor a "reasonable authenticated notification of disposition." UCC § 9-611(b). The only exception to this notification requirement is if the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. UCC § 9-611(d). There is no indication that the gramophone in this problem fits into any of those categories. Therefore, because the bank sent no notification to the company before the disposition, the disposition was improper. This breach of the bank's obligation may expose the bank to liability to the company for damages (*see* UCC § 9-625(b)) or lessen the amount of any deficiency recoverable by the bank after application of the proceeds of sale to the company's obligation. *See* UCC § 9-626.

[NOTE: An examinee might mention that a private sale of collateral, such as occurred here, is permissible if commercially reasonable. This is true. UCC § 9-610(b). But this does not obviate the requirements with respect to pre-disposition notification.]

Point Two (40%)

The bank's security interest in the gramophone is superior to the judgment creditor's lien because the bank's security interest was perfected before the judgment creditor obtained his lien.

Except as otherwise provided in the UCC, a security agreement is effective against creditors. UCC § 9-201(a). UCC § 9-317 provides such an exception, however. That section indicates that a security interest is subordinate to the rights of a person who became a lien creditor before the security interest was perfected. UCC § 9-317(a)(2)(A). Here, the judgment creditor is a lien creditor under § 9-102(a)(52)(A) because of his judicial lien. Thus, the bank's security interest in the gramophone will be subordinate to the rights of the judgment creditor only if the bank's security interest was not perfected when the judgment creditor became a lien creditor.

A security interest is not perfected unless it has "attached." UCC § 9-308(a). A security interest attaches when it becomes enforceable unless the time of attachment has been postponed by agreement. UCC § 9-203(a). Thus, the bank's security interest in the gramophone cannot be perfected unless it is enforceable. A security interest is enforceable if the three criteria in UCC § 9-203(b) have been satisfied. The first two criteria are clearly satisfied: "value" has been given (because the loan was made) and the debtor (the company) had rights in the gramophone (the company owned it). *See* UCC §§ 9-203(b)(1)-(2) and 1-204. The third criterion can be satisfied in several ways. Here, it is satisfied because the requirements of UCC § 9-203(b)(3)(B) ("the collateral . . . is in the possession of the secured party . . . pursuant to the debtor's security agreement") are met. The gramophone was in the possession of the bank, and this was pursuant to the company's "security agreement." A "security agreement" is an agreement that creates or provides for a security interest. UCC § 9-102(a)(74). Thus, the oral agreement between the company's owner (speaking for the company) and the bank is a security agreement pursuant to which the bank took possession of the gramophone. Accordingly, when the bank took possession of the gramophone, its security interest was enforceable and attached.

An attached security interest can be perfected in many ways. *See generally* UCC § 9-308. In the case of security interests in goods, one method of perfection is for the secured party to take possession of the goods. UCC §§ 9-310(b)(6), 9-313(a). Thus, the bank's possession of the gramophone not only was an element of enforceability and attachment but also resulted in perfection of the security interest.

Because the bank's security interest in the gramophone was perfected before the judgment creditor became a lien creditor, the bank's security interest is superior to the judgment creditor's judicial lien.

[NOTE: An examinee may mention that the language in the loan agreement, standing alone, would be insufficient to create an enforceable and attached security interest in the gramophone. This is accurate, but the bank's possession of the gramophone pursuant to the oral agreement is sufficient. Thus, the security interest is enforceable and attached whether or not the language in the written loan agreement would suffice in the absence of the bank's possession. Some examinees may discuss the elements of enforceability of a possessory security interest in the answer to question 1 and refer back to that discussion in their answer to this question. Such examinees should get credit for that analysis as part of their answer to question 2. Examinees may organize their answers either way and receive full credit.]

Point Three (40%)

The bank does not have an enforceable security interest in the company's other assets because the description of the collateral in the loan agreement is insufficient to create an enforceable security interest in those assets.

A security interest attaches when it becomes enforceable unless the time of attachment has been postponed by agreement. UCC § 9-203(a). The three criteria in UCC § 9-203(b) have not been satisfied. The first two criteria are clearly satisfied: "value" has been given (because the loan was made) and the debtor (the company) has rights in its personal property (because it owns it). *See* UCC §§ 9-203(b)(1)-(2) and 1-204. The third criterion has not been satisfied.

Here, because the bank does not have possession of the remaining personal property of the company (and other specialized criteria are inapplicable), the bank's security interest in that personal property is enforceable only if the requirements of UCC § 9-203(b)(3)(A) are met. Under that provision, the debtor must have authenticated (i.e., signed or its electronic equivalent) a security agreement that contains a description of the collateral. The loan agreement is a security agreement inasmuch as it creates or provides for a security interest. UCC § 9-102(a)(74). Moreover, it is authenticated inasmuch as we are told in the question that the loan agreement was signed by the company's owner. *See* UCC § 9-102(a)(7) (definition of "authenticate") and UCC § 1-201(b)(37) (definition of "signed"). The description of the collateral in the security agreement is insufficient, however. UCC § 9-108(a) states that, except as provided in, *inter alia*, UCC § 9-108(c), a description of personal property is sufficient if it reasonably identifies what is described. UCC § 9-108(c), though, provides that descriptions of a debtor's property such as "all of the debtor's personal property" or words of a similar import do *not* reasonably identify the collateral. Here, the description of the collateral in the loan agreement is "all personal property" owned by the company. Therefore, the description is insufficient under UCC § 9-108, and accordingly the security agreement does not satisfy the requirements of UCC § 9-203(b)(3)(A).

Thus, the bank's security interest in the company's assets (other than the gramophone in the possession of the bank discussed in Point One) is not enforceable. Since the security interest is not enforceable, it did not attach; since the security interest did not attach, the security interest is not perfected.

[NOTE: An examinee may mention that "all personal property" is a sufficient indication of collateral in a financing statement. That is true. UCC § 9-504(2). But the filing of a financing statement cannot perfect a security interest that does not attach. Therefore, the security interest is not perfected here even if the financing statement would be sufficient to perfect a security interest that, unlike here, attached.]

AGENCY & PARTNERSHIP ANALYSIS

AGC (V.A.; VI.; VII.; VIII.)

ANALYSIS

Legal Problems:

(1) What type of business entity is Radiology Services?

(2) Did Carol have the authority to purchase the imaging machine without the consent of Jean and Pat?

(3) Did Jean's statements to Carol constitute a withdrawal from Radiology Services?

(4) Were Jean's statements sufficient to entitle her to receive a buyout payment from Radiology Services for her interest in the practice?

DISCUSSION

Summary

Radiology Services is an "at-will" general partnership because Carol, Jean, and Pat agreed to share profits and operate the business together without specifying a specific term. They did not form a limited liability company (LLC), as they intended, because no documentation to create an LLC was signed or filed.

As a partner of the general partnership, Carol had the authority to purchase the imaging machine on behalf of the partnership without the consent of either Jean or Pat because each partner has the authority to conduct partnership business. And while a partner may be liable to the other partners for a purchase that exceeds her authority, here Jean likely has no claim against Carol for purchasing the machine without the consent of Jean and Pat because the purchase of the imaging machine was most likely in the ordinary course of the business of the partnership.

Jean's oral statements to Carol stating her will to withdraw from Radiology Services resulted in her dissociation from the partnership, and because the partnership was "at will," her dissociation was not wrongful.

Because Carol and Pat agreed to continue the partnership, Jean's dissociation did not result in the dissolution and winding up of the partnership. Instead, Jean is entitled to receive a buyout payment from Radiology Services for her one-third partnership interest 120 days after making a written demand for payment. Because Jean did not make a written demand, the partnership has no specified time in which to pay her the buyout price.

[NOTE: General partnerships are governed by either the Revised Uniform Partnership Act (RUPA) (1997, as amended), the Revised Uniform Partnership Act (1997), or the Uniform Partnership Act (1914) (UPA). The 1997 act, which the Uniform Law Commission amended in both 2011 and 2013 as part of its harmonization project, applies in all states (sometimes with the amendments) except for Georgia, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina,

and Wisconsin, which continue to use versions of the UPA (1914). Because the facts state that Radiology Services is in a jurisdiction that has adopted the RUPA (1997, as amended), citations to the other acts are omitted, although the results under those acts are similar.

The Uniform Limited Liability Company Act (2006, as amended) contains principles that are widely adopted in LLC law. In all states, articles of organization must be signed and filed to create an LLC.]

Point One (20%)

Radiology Services is a general partnership. Despite their intentions, Carol, Pat, and Jean never formed a limited liability company.

A general partnership is formed whenever two or more persons associate (whether or not in writing) for the purpose of carrying on a business for profit. *See* Revised Uniform Partnership Act (RUPA) § 202(a) (1997, as amended) ("the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership"). Here, by agreeing to share profits and operate their radiology practice together, Carol, Jean, and Pat formed a general partnership, despite their intention to operate their business as a limited liability company. Furthermore, because the partnership was for neither a fixed term nor a specific undertaking, it was an "at-will" partnership.

A limited liability company is formed by the filing of a signed certificate of organization with the Secretary of State. Rev. Unif. Limited Liability Company Act § 201 (2006, as amended). Here, no certificate was signed or filed; thus, Carol, Jean, and Pat did not form a limited liability company.

[NOTE: Although some jurisdictions have recognized the "de facto" LLC doctrine where there has been a good-faith but failed attempt to form the LLC, this doctrine insulates members only from liability to third parties; it does not create an LLC as between the members themselves. *See* Ifeneka Duruigbo, *The De Facto and Estoppel Concepts in the LLC Context: Still Birth or Stunted Growth?*, ExpressO (2009), available at https://works.bepress.com/ifeneka_duruigbo/1/.]

Point Two (30%)

Carol had the authority to purchase the imaging machine without the consent of Jean and Pat because it appears that Carol purchased the machine in the ordinary course of business and was unaware of Jean's concerns about purchasing expensive imaging equipment.

Section 401(h) of the Revised Uniform Partnership Act, as amended, provides that "each partner has equal rights in the management and conduct of the partnership's business." This grant of authority to each partner is tempered by subsection 401(k), which provides: "A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the affirmative vote or consent of all the partners."

As the comments to Section 401(h) note, the scope of a partner's authority is governed by agency law principles. If the partnership agreement is silent on the scope of the agent-partner's authority, a partner has actual authority to commit the partnership "to usual and customary matters, unless the partner has reason to know that (i) other partners might disagree, or (ii) for some other reason consultation with fellow partners is appropriate." *See* comments to RUPA § 401 (1997, as amended). In light of this principle, a partner has authority to bind the partnership as to "usual and customary" dealings with third parties and need not seek the prior approval of the other partners unless the partner has reason to believe that the other partners might not approve or might expect to be consulted. Furthermore, under general agency law principles, a partner does not have actual authority to take "unusual or non-customary actions that will have a substantial effect on the partnership." *Id.*, comment to subsection h.

Here, it appears that purchase of the equipment was in the ordinary course of business. The partners had purchased state-of-the-art imaging equipment when they started the practice, they had agreed to run the practice in a manner consistent with other area practices, and other practices had bought equipment like that which Carol purchased.

Further, although Jean had concerns about the practice purchasing expensive imaging machines, there is no indication that Carol was aware of Jean's concerns when she made the purchase. The facts clearly state that Jean did not express her concerns to either Carol or Pat. Furthermore, the facts indicate that the three partners (including Jean) had agreed that the partnership would have imaging equipment that would allow it to be competitive with other similar practices in the community.

Point Three (20%)

Jean's oral statement to Carol, "I'm out of here," resulted in Jean's dissociation from the partnership.

A partner is dissociated from a partnership when the partnership has notice of the partner's will to withdraw as a partner. RUPA § 601(1) (1997, as amended). A partner can dissociate from the partnership at any time. The notice of the partner's will to withdraw need not be in writing. *See* RUPA §103(b)(6) (partnership agreement may provide that notice of withdrawal be in writing). The dissociation is rightful—that is, the dissociating partner has no obligations to the other partners—when the partnership is at will and the dissociation breaches no express provision in the partnership agreement. *See also* RUPA § 102(13) (1997, as amended) ("'partnership at will' means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking"); § 602(b) (1997, as amended) (specifying that a partner's dissociation is wrongful in an at-will partnership "only if . . . it is in breach of an express provision of the partnership agreement").

Here, Jean's statement to Carol that "I'm out of here and never coming back" constituted a dissociation, and it was not wrongful because there is no indication in this at-will partnership that her withdrawal breached any express provision in the partnership agreement.

Point Four (30%)

Because Carol and Pat agreed to continue the partnership, Jean's dissociation did not result in the dissolution and winding up of the partnership. Instead, Jean is entitled to receive a buyout price for her partnership interest 120 days after she makes written demand for payment. Because her demand was not in writing, the partnership has no specified time in which to make payment.

Normally, a partner's dissociation in an at-will partnership results in its dissolution, and the business must be wound up. *See* RUPA § 801(1) (1997, as amended). But such dissolution can be rescinded by the affirmative vote or consent of all remaining partners. *Id.* § 803; *accord,* RUPA § 802(b) (1997, as amended) (permitting the partners to "waive the right to have the partnership's business wound up and the partnership terminated"). Under RUPA, as amended, the dissociating partner is no longer considered a partner and does not participate in this decision to continue the partnership. *See* RUPA § 102(10) (1997, as amended) (the term "partner" does not include a partner who dissociated under Section 601).

When a partnership is continued and not dissolved, the dissociating partner is entitled to have her interest purchased for a buyout price equal to that partner's interest in the value of the partnership, based on the greater of its liquidation or going-concern value (plus interest from the date of dissociation). RUPA § 701 (1997, as amended). Further, if the withdrawing partner makes a written demand for payment and no agreement is reached within 120 days after the demand, the partnership must pay in cash the amount it estimates to be the buyout price, including accrued interest. *Id.* § 701(c).

Here, although Jean made clear her will to withdraw, the partnership was not dissolved because Carol and Pat agreed to continue the partnership. Thus, Jean would be entitled to receive payment of a buyout price. Although Jean made an oral statement demanding payment for her interest, her demand was not in writing. Thus, the partnership does not have a specific time in which to pay the buyout price. But if Jean makes her demand in writing, the partnership would have to reach an agreement with her on the buyout price within 120 days or, failing this, pay her in cash its estimate of the buyout price plus accrued interest.

CIVIL PROCEDURE ANALYSIS

CIV (I.A., B.)

ANALYSIS

Legal Problems:

(1)(a) Does the woman's claim for $1 million in damages satisfy the amount-in-controversy requirement for diversity jurisdiction?

(1)(b) Is the woman a citizen of State C or State A for the purpose of determining federal diversity jurisdiction?

(1)(c) Is the airline a citizen of State A, State B, or State C for the purpose of determining federal diversity jurisdiction?

(2)(a) Are there sufficient contacts between the airline and State B for a State B court to exercise specific personal jurisdiction over the airline in a personal injury action brought by a State C resident, arising out of an accident in State A, and involving travel between States A and C?

(2)(b) Are there sufficient contacts between the airline and State B for a State B court to exercise general personal jurisdiction over the airline in a personal injury action brought by a State C resident, arising out of an accident in State A, and involving travel between States A and C?

DISCUSSION

Summary

The court should grant the motion to dismiss. Although the court would have diversity jurisdiction, the court lacks personal jurisdiction over the airline.

The woman's claim against the airline is based on state law, so diversity is the only basis upon which a federal district court could exercise subject-matter jurisdiction over this case. Here, the amount in controversy is more than $1 million and clearly sufficient for diversity jurisdiction. Further, the parties are diverse.

The woman's citizenship, determined by her domicile, is State C, where she has lived her entire life.

The airline is a citizen of State A, where it is incorporated and where its corporate headquarters are located.

The federal court in this case can exercise personal jurisdiction over the airline only if the airline would be subject to the jurisdiction of the State B state courts. Because the State B courts exercise jurisdiction to the limits of the Constitution, the question is whether the airline has sufficient "minimum contacts" with State B "such that the maintenance of the suit [in State B]

does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Here, there are insufficient contacts with State B for either general or specific jurisdiction. The only contact between the airline and State B that is mentioned in the facts is that State B is the location of the airline's online and telephone reservation center. The woman's personal injury action arises out of an accident that occurred in State A and had no connection at all to State B. Although the woman booked her ticket through the reservation center in State B, the woman's claim for bodily injury has no relation to the manner in which she purchased her ticket or to the fact that the reservation center is in State B. On these facts, it does not seem that the airline could reasonably anticipate being haled into a State B court for this particular claim. Moreover, if this claim is allowed, then any personal injury claim against the airline could be litigated in State B, regardless of where and how the injury occurred, if the related ticket was booked online or by telephone. This seems unreasonable, without some additional evidence concerning the nature and extent of the airline's State B contacts.

Point One(a) (10%)

The court has diversity jurisdiction only if the amount in controversy exceeds $75,000 and the parties are citizens of different states.

The diversity jurisdiction statute, 28 U.S.C. § 1332(a)(1), grants original federal jurisdiction to the United States District Courts in cases "where the amount in controversy exceeds . . . $75,000 . . . and is between (1) citizens of different States." Diversity of citizenship is determined as of the time the suit is filed.

Here the woman's claim for relief seeks in excess of $1 million, a potentially credible amount since the facts note that the woman sustained serious and permanent physical injuries that interfered with her ability to act upon a job offer. In deciding a motion to dismiss on jurisdictional grounds, the court will take the woman's claim for relief at face value with respect to the amount in controversy unless it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

Point One(b) (20%)

Here, the woman is a citizen of State C because, despite her desire to move to State A, she has never established a residence in State A.

The citizenship of individuals for diversity purposes is determined by domicile at the time of the lawsuit. Domicile continues until changed, and in this case, the facts demonstrate that when the events began, the woman, a lifelong resident of State C, was a State C domiciliary and a State C citizen for diversity purposes. A person can change her domicile by (1) taking up residence in a new jurisdiction with (2) the intent to remain there indefinitely. *Gilbert v. David*, 235 U.S. 561

(1915). Here, the woman appears to have had an intention to move to State A and make it her home indefinitely. She accepted a job in State A, and she signed a lease on an apartment there.

However, the woman never took up residence in State A and therefore did not change her domicile. The mere "expression of an intention to move one's residence, without actually moving" is not sufficient to establish a domicile. Jack H. Friedenthal, Mary Kay Kane & Arthur R. Miller, *Civil Procedure* 31-32 (4th ed. 2005). The woman was temporarily present in State A and signed a one-year lease for an apartment. She was also briefly hospitalized in State A. But her physical presence in State A never coincided with a *present* intent to remain in State A indefinitely. At the time of her trip to State A, she always intended to return to State C and to make her permanent move to State A at a later date. Thus, that trip alone would be insufficient to change the woman's diversity citizenship from State C to State A.

[NOTE: An examinee who erroneously concludes that the September events did change the woman's domicile to State A should consider whether subsequent events changed her domicile back to State C. Thus, after her hospitalization, she returned to State C to live, with a desire to move to State A in the future, but with no clear time at which that would happen. Thus, it would be reasonable to conclude that the woman re-acquired her State C domicile because she is now present there with no immediate plans to leave (i.e., she intends to remain there for an indefinite period of time).]

Point One(c) (20%)

The airline is a citizen of State A, where it is incorporated and where, under the "nerve center" test of *Hertz Corp. v. Friend*, the airline has its principal place of business.

The airline's citizenship for diversity purposes is determined by both the place of its incorporation and the place where it has its principal place of business. *See* 28 U.S.C. § 1332(c)(1). Here, its place of incorporation is State A. Its principal place of business is "the place where the corporation's high-level officers direct, control, and coordinate the corporation's activities." *See Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). The facts state that the airline's corporate headquarters are in State A, and there is no suggestion that the officers run the corporation from any other location. The airline is, therefore, a citizen of State A under the principal-place-of-business rule as well as the place-of-incorporation rule.

Because the airline is a citizen of State A and the woman is a citizen of State C, the parties are diverse. As noted earlier, the amount in controversy exceeds $75,000. Thus, the court has diversity jurisdiction.

Point Two(a) (25%)

The fact that the airline maintains an online reservation facility in State B is not a sufficient basis for State B to exercise specific personal jurisdiction over a personal injury action that arose out of an incident in another state, involved airline transportation between two different states, and was brought by a plaintiff who is a resident of another state.

A federal court can exercise personal jurisdiction over a defendant who is subject to the jurisdiction of the courts of the state in which the federal court sits. *See* Fed. R. Civ. P. 4(k)(1)(A). In this case, State B's courts exercise jurisdiction to the limits of the Constitution. The federal district court can therefore take personal jurisdiction over the airline if the airline has sufficient "minimum contacts" with State B "such that the maintenance of the suit [in State B] does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In this inquiry, two critical questions are whether the quality and nature of the airline's contacts with the jurisdiction are such that it can reasonably anticipate being haled into court there and whether those contacts are such that it is reasonable to expect the airline to defend the action in State B. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), the Supreme Court recognized a distinction between "general jurisdiction" (also called "all-purpose" jurisdiction), which permits a court to exercise jurisdiction over any claim against a defendant if the defendant has extensive connections with the forum, and "specific jurisdiction" (also called "case-linked" jurisdiction), which permits a forum to hear a case only if the suit arises out of or relates to the defendant's forum contacts.

In this case, there does not seem to be a basis for State B to exercise specific jurisdiction. For specific jurisdiction to be proper, there must be "'an affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

Here, the only connection between the airline and State B is that State B is the location of the airline's reservation center. The woman's suit, however, is not directly related to the presence of the airline reservation center in State B. Rather, the woman's claim against the airline arises from the accident in State A and her use of the airline to fly between States A and C. The airline's affiliation with State B is not sufficiently related to the woman's claim to require the airline to defend the action in State B on the basis of specific jurisdiction.

Point Two(b) (25%)

The airline's operation of a reservation center in State B is not a sufficient basis for a State B court to exercise general jurisdiction over the airline when the airline is incorporated elsewhere, its principal place of business is elsewhere, and its operations in other states are far more extensive than in State B.

General (all-purpose) jurisdiction is proper over a corporation only when "the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities." *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). Although courts and commentators often have described the standard for general jurisdiction as whether a corporation has engaged in a "substantial, continuous and systematic course of business" in a state, the Supreme Court has recently described that standard as "unacceptably grasping." *Daimler A.G. v. Bauman*, 571 U.S.

117, 138 (2014). The proper test is not whether the activities are "continuous and systematic," it is whether the business's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Daimler A.G.* at 138-39 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)). There are "only a limited set of affiliations with a forum" that will justify concluding that the corporation is "essentially at home" there. The paradigmatic affiliations are place of incorporation and principal place of business, each of which has "the virtue of being unique . . . as well as easily ascertainable." *Daimler A.G.*, 571 U.S. at 137.

In this case, the maintenance of a reservation center in State B that employs 150 people is unlikely to be enough to justify a conclusion that the airline is "essentially at home" there. The airline is incorporated elsewhere, its headquarters are elsewhere, and the bulk of its physical operations (employing thousands of people) occur elsewhere. The fact that it engages in substantial business activities in State B (as well as in other states where it conducts part of its operations) is, by itself, not sufficient to satisfy the court's requirement that it be "essentially at home" there, especially given the Court's admonition that only a "limited set of affiliations" will suffice for a forum to assert all-purpose jurisdiction over a defendant. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 883 (Cal. 2016) (drug company is not "at home" in California—even though it sells "large volumes of its products" in California, maintains several research facilities in California, and employs hundreds of people in California—when company's forum operations "are much less extensive than its activities elsewhere in the United States," and company is incorporated and has its principal place of business elsewhere), *reversed on other grounds*, 137 S.Ct. 1773 (2017).

Because there is no personal jurisdiction, the court should grant the motion to dismiss.

[NOTE: Pursuant to 28 U.S.C. § 1631, the court has the authority to transfer the case to another court in order to avoid the jurisdictional problem. Some examinees may mention this as an alternative to dismissal.]

TRUSTS & FUTURE INTERESTS ANALYSIS

TRU (I.C.2., E., F., I.2., I.4., I.5.)

ANALYSIS

Legal Problems:

(1) Could the trustee have properly distributed trust assets to the son to enable him to pay his hospital bill, child support obligations, or loan to purchase the computer-gaming system?

(2) Did the trustee abuse his discretion in refusing to make any distributions to the son?

(3) In light of both the discretion granted the trustee and the spendthrift clause in the trust, may the son's three creditors obtain orders requiring the trustee to pay their claims against the son from trust assets?

DISCUSSION

Summary

The settlor created a discretionary support trust with spendthrift protection. A discretionary support trust permits distributions *only* for the support of trust beneficiaries, and it provides a trustee with discretion (which the trustee may not abuse) to withhold a distribution even when a beneficiary needs support.

A hospital bill and court-ordered child support are debts incurred for support, which the trustee could pay in his discretion, but a loan to purchase a recreational computer-gaming system would not likely be characterized as a debt incurred for support.

Given the trustee's personal animosity toward the son, the trustee's comparatively liberal distributions to the daughter, and the absence of any reasonable justification for withholding distributions to the son, the son should be able to show that the trustee breached his duty by refusing to make distributions to the son. Thus, the son should be able to bring a successful action against the trustee for the trustee's failure to make distributions that would have enabled him (in whole or in part) to pay the hospital and child-support debts or receive other distributions for support.

Under the Restatement (Third) of Trusts, a creditor of a support trust beneficiary with spendthrift protection may reach trust assets if the creditor provided a necessary to the trust beneficiary or seeks to enforce a child-support claim. The son's former wife and the hospital thus should be able to obtain orders against the trustee for their respective claims. However, because the purchase of a computer-gaming system is not a "necessary" for a person of modest means, the friend cannot obtain an order against the trustee seeking payment for that debt. Under the provisions of the Uniform Trust Code, only the child support would be recoverable.

Point One (40%)

The settlor created a discretionary support trust subject to a spendthrift clause. The hospital bill and child support debt are support expenses for which the trustee could distribute trust assets to the son. The loan to purchase a computer-gaming system is not likely to be characterized as support.

The settlor created a discretionary support trust subject to a spendthrift clause. A support trust permits distributions from the trust to enable the beneficiary to maintain his or her accustomed standard of living. Restatement (Third) of Trusts § 50, cmt. d(2). When a trust instrument grants the trustee of a support trust discretion whether or not to pay a beneficiary's support-related expenses, the trustee's judgment controls unless the trustee abuses his discretion. *Id.* § 50 cmt. d(1).

This trust is also subject to a spendthrift clause. This clause may prevent a beneficiary's creditors from reaching trust assets, see Point Three, but it does not prevent the beneficiary himself from reaching trust assets if the trustee has abused his discretion in failing to make payments to the beneficiary.

The meaning of the term "support" is fact-dependent. Support includes more than necessities or bare essentials. Most courts measure support in terms of the lifestyle to which the beneficiary has become accustomed even if the trust instrument does not expressly refer to that lifestyle. A beneficiary's accustomed lifestyle is determined at the time the beneficiary's trust interest is created, but is subject to adjustment to accommodate the beneficiary's changing needs. *Id.* § 50 cmt. d(2).

Necessary medical care is invariably treated as support. *Id.* Support also invariably includes "reasonable amounts for the support of . . . minor children who reside elsewhere but for whom the beneficiary either chooses or is required to provide support." *Id.*

Here, the trustee could properly have distributed trust assets to the son to pay the son's hospital bill and child support obligation.

On the other hand, without more facts, a distribution to allow repayment of the son's debt incurred for the purchase of a computer-gaming system would not appear to be a distribution for the son's support. Of course, if the son could establish that such a system is necessary to allow him to live in accordance with his accustomed lifestyle, then it might be considered a support expense. However, the facts state that the son's income is about $35,000, a modest sum in light of the son's child support obligation and expenses for basic needs such as health care, food, clothing, shelter, and transportation. Given this income, it is unlikely that the son could establish a lifestyle that would warrant the trustee's conclusion that the recreational computer-gaming system is a support expense.

Point Two (35%)

The trustee likely abused his discretion in failing to make any distributions to the son, including distributions for the payment of the hospital bill and child support.

The fact that the son's hospital bill and child support obligations should be characterized as support is not the end of the matter. When the trust instrument grants a trustee discretion to pay a beneficiary's support-related expenses, the trustee's judgment controls unless the trustee abuses his discretion. Restatement (Third) of Trusts § 50, cmt. d(1). A trustee's discretionary power is subject to judicial control "only to prevent . . . abuse of the discretion by the trustee." *Id.* § 50. Trustees may have a number of legitimate reasons to withhold payments from a beneficiary, including discharging the trustee's duty to act impartially with respect to all trust beneficiaries and the beneficiary's ability to pay the expenses from other resources. However, if a court finds that a trustee acted in bad faith or with an improper motive, it may overrule his decisions. *Id.*

What constitutes an abuse of discretion, according to the Restatement (Third), depends upon the terms of the trust instrument and the other duties of the trustee, such as the duty to administer the trust in accordance with its terms, the duty to act impartially, and the duty of care. *See id.* § 50, cmt. b. These duties, read together, entitle the beneficiary to "general information concerning the bases upon which the trustee's discretionary judgments have been or will be made." *Id.* Furthermore, a trustee abuses discretion by acting in bad faith or with an improper motive. *Id.*; *see also* § 50, cmt. e(1).

As section 50 of the Restatement (Third) suggests, where, as here, there are multiple trust beneficiaries, the trustee's duty of impartiality requires that, in making distributions, the trustee act "with due regard for the diverse beneficial interests created by the terms of the trust." *Id.* § 79. "The duty of impartiality is an extension of the duty of loyalty to beneficiaries but involves, in typical trust situations, unavoidably and thus permissibly conflicting duties to various beneficiaries with their competing economic interests.

It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of 'equality' of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests. Impartiality does mean that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration." *Id.* at § 79, cmt. b.

Here, there is a strong argument that the trustee abused his discretion by withholding support distributions from the son. He ignored the son's repeated requests for distributions, without offering any reason for his refusals. He made substantial distributions to the daughter, whose income was not, on average, different from the son's. The trustee made disparaging comments about the son (that the son was a "bum," a "terrible father," and an "adulterer," and was "rude" to the trustee). Together, these facts support an inference that the trustee withheld distributions from the son because of personal animus rather than a valid reason. All of this supports the conclusion that the trustee abused his discretion in withholding distributions from the son.

[NOTE: Although the question does not ask whether the son could successfully sue based on the trustee's abuse of discretion or what he could recover if his suit were successful, in cases like

this one, if the court finds an abuse of discretion, it will typically make an independent judgment of what the trustee would have distributed when carrying out his fiduciary duties and then direct that such payment be made from the trust, if trust assets are available, or otherwise surcharge the trustee. *See generally* Unif. Trust Code § 504(d).]

Point Three (25%)

Despite the trust's spendthrift clause, the son's former wife and, assuming that the necessaries doctrine applies, the hospital may reach the son's interest in the trust to satisfy their claims if the trustee abused his discretion. However, the friend cannot reach the son's interest to satisfy his claim against the son.

The trust created by the settlor was discretionary. "[I]f the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion . . . a creditor of the beneficiary is entitled to receive . . . any distributions the trustee . . . is required to make in the exercise of that discretion . . . ." *See* Restatement (Third) of Trusts § 60.

This general principle does not apply, however, when a trust includes a spendthrift clause. *See id.* § 59. A spendthrift clause puts trust assets out of the reach of most creditors of a trust beneficiary until such time as trust assets are distributed to that beneficiary. *Id.* § 58. *Accord*, Unif. Trust Code § 502.

However, even when a trust provides spendthrift protection, claims against a beneficiary for unpaid child support may still be enforced against the trust. *See* Restatement (Third) of Trusts § 59 cmt. b; Unif. Trust Code § 504(c)(2) (a court may order the trustee to pay the child "such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute for the benefit of the beneficiary had the trustee complied with the [support] standard or not abused the discretion"). Here there is a strong argument that the trustee breached his discretion (*see* Point Two), such that the former wife will be able to obtain payment from the trustee.

In some jurisdictions, creditors who provided the beneficiary with "necessaries" such as health care may reach the beneficiary's interest in satisfaction of any unpaid debt despite a spendthrift clause. Restatement (Third) of Trusts §§ 59, 60 cmt. c. (Comments to the Restatement suggest that the creditor may reach the beneficiary's interest but may not force a sale of the interest. In such a case, the court could direct the trustee to distribute trust income to the creditor until the claim is paid. *Id.* § 56 cmt. c.). Medical care is invariably treated as a necessary. But if in addition to a spendthrift clause, distributions are discretionary with the trustee, the creditor who provided the beneficiary with a necessary cannot compel a distribution if the beneficiary could not do so. In other words, the creditor cannot compel a distribution in the absence of an abuse of discretion. *Id.* § 60 cmt. e.

The necessaries exception is not recognized in the Uniform Trust Code. *See* Unif. Trust Code §§ 503 and 504, cmt. to subsection b. Comments to the Restatement also suggest that the necessaries rule, while consistent with prior trust Restatements, is not followed in some U.S. jurisdictions. In these jurisdictions, the hospital cannot reach the son's interest in the trust in satisfaction of its claim.

In jurisdictions that follow the necessaries doctrine as applied to a spendthrift clause, the hospital's claim is not barred by the spendthrift clause. But because distributions from the trust are discretionary, the hospital will not be able to reach the son's interest unless the trustee abused his discretion. Here, there is a strong argument that the trustee abused his discretion, thus allowing the hospital to reach the son's interest and obtain some payment from the trustee. *See* Point Two.

The friend should not succeed in his suit against the trustee. The friend's claim is not a claim for support, and here, the facts cannot support an assertion that a $5,000 computer-gaming system is a "necessary" for the son.

CRIMINAL LAW & PROCEDURE ANALYSIS

CRM (II.A., B., D.; IV.B.1.)

ANALYSIS

Legal Problems:

(1) Does someone who unlawfully enters the dwelling of another commit burglary when the purpose of the entry was to retrieve property that the person owns?

(2)(a) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of larceny when he acts without authorization and with the intention of depriving the owner of his property?

(2)(b) Does someone who sells property that has been temporarily entrusted to him by its owner commit the crime of embezzlement when he acts without authorization and with the intention of depriving the owner of his property?

(3) Does a purchaser of property commit the crime of receiving stolen property when the surrounding circumstances suggest that a reasonable person should have been alerted to the fact that the property she received was stolen?

DISCUSSION

Summary

Ben, who intended only to retrieve his own painting from the neighbor's house, did not have an intent to commit a felony therein. Therefore, he should not be charged with burglary.

The facts do not support a charge of larceny against Ben for his acts in connection with the print. Larceny is typically defined under the common law as the misappropriation of another's property by means of taking it from his possession without his consent. With respect to the print, Ben did not take it from its owner without his consent. To the contrary, the neighbor voluntarily loaned the print to Ben. Ben's subsequent sale of the print, while wrongful, was not larceny.

On the other hand, Ben may be charged with the theft crime of embezzlement for his acts in connection with the print. A person in lawful possession of another's property commits embezzlement when he wrongfully converts the property with the intent to deprive the owner of it. Ben's sale of the print to the art dealer constituted an embezzlement because Ben's intent was to permanently deprive the neighbor of the print.

Whether the art dealer should be charged with receiving stolen property for her acts in connection with the print depends on whether there is sufficient evidence that she knew the print was stolen. The crime of receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of the defendant's

knowledge that the property was stolen. Here, the art dealer "received" the print when she took physical possession of it following the sale by Ben. The central question is whether the art dealer satisfies the mens rea requirement of knowledge that the print was stolen. Proof of the requisite knowledge can be inferred from the surrounding circumstances, including (1) the low price, (2) Ben's statement to the art dealer, "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.

Point One (20%)

Ben should not be charged with burglary based on his attempt to recover the painting because he did not act with the necessary mens rea.

At common law, burglary was defined as the "breaking and entering of the dwelling house of another in the night with the intent to commit a felony" therein. *See* Wayne R. LaFave, *Criminal Law, Chapter 21: Real Property Crimes* § 21.1 (5th ed. 2010).

Ben's acts clearly satisfy three of the elements of burglary as defined by the common law and in statutes based on the common law: (1) Ben illegally entered the neighbor's home by using force to push open the neighbor's ground-floor window and starting to climb inside; (2) the neighbor's house is a "dwelling," a "structure," or an "occupied structure" (it would even satisfy the common law requirement of a "dwelling"); and (3) Ben's acts occurred at night.

Here, the only question is whether Ben satisfies the mens rea requirement. The evidence suggests that Ben did not intend to commit a felony in the neighbor's home because he intended only to retrieve his own painting. On these facts, Ben should not be charged with burglary.

Point Two(a) (20%)

Ben should not be charged with the theft crime of larceny of the print because he did not take possession of the print without the neighbor's consent with the intent to steal it from the neighbor.

The crime of "theft" was traditionally three separate crimes: larceny, embezzlement, and false pretenses. *See* LaFave, *supra, Chapter 19: Theft* § 19.1. Here, Ben should not be charged with larceny, although he should be charged with embezzlement (*see* Point Three).

At common law, larceny was defined as the misappropriation of another's personal property by means of taking it from his possession without his consent. *See id.* Larceny requires an intent to steal. *See Bonnie v. State*, 583 A.2d 1037, 1041–42 (Md. Ct. App. 1991) (noting that intent to steal not established by the defendant's honest belief, even if such belief was mistaken, that the property belonged to him). Moreover, under the common law, the intent to retain property

temporarily and then return it to its rightful owner has long provided a defense to larceny. *See, e.g., Ingmon v. State*, 58 P.2d 523, 524 (Ariz. 1936).

Here, Ben should not be charged with larceny because (a) he did not take the print from the neighbor without the neighbor's consent, and (b) there are no facts showing that he had the requisite intent to steal when he took the print from the neighbor. It was the neighbor who had proposed swapping the artworks. Thus, when Ben took possession of the neighbor's print he had the neighbor's permission to take it, and there are no facts supporting an inference that Ben intended to steal it from the neighbor at that time.

Point Two(b) (30%)

Ben should be charged with the theft crime of embezzlement because his sale of the neighbor's print to the art dealer was a wrongful conversion of that property done with the intent to permanently deprive the neighbor of his property.

To cover the case where someone in lawful possession of another person's property wrongfully misappropriates such property, the English parliament and U.S. legislatures developed the theft crime of embezzlement. Although precise statutory definitions vary, embezzlement generally occurs when a person unlawfully converts property owned by another to his own use with the intent to permanently deprive the lawful owner of the property. LaFave, *supra*, § 19.6.

Here, Ben should be charged with embezzlement. The neighbor loaned the print to Ben so that Ben could hang it in his living room temporarily. *See id.* § 19.6(c). When Ben, in a fit of anger following his arrest, sold the print to the art dealer, he wrongfully converted the neighbor's property. Ben's actions suggest strongly that he acted with the requisite intent to permanently deprive the neighbor of the print.

Point Three (30%)

The art dealer probably should be charged with receiving stolen property because the surrounding circumstances suggest that she had the requisite knowledge that the print was stolen.

Receiving stolen property typically has two elements: (1) the actus reus of the receipt of stolen property and (2) the simultaneous mens rea of knowledge that the property was stolen. Most jurisdictions include the further requirement that the defendant intend to deprive the owner of her property. LaFave, *supra*, § 20.2. "Stolen property" typically includes property unlawfully obtained using larceny, embezzlement, or false pretenses, because "it is inappropriate to make the liability of the receiver turn on the method by which the original thief acquired the property." *See id.* at n. 57 (quoting Model Penal Code § 223.6, comment at 241).

Here, the facts support charging the art dealer with receiving stolen property. The art dealer "received" the print. Assuming that Ben embezzled the print, *see* Point Two(b), it would constitute stolen property.

The central question is therefore whether the facts establish that the art dealer had the requisite mens rea of knowledge that the print was stolen. Normally, a person is not guilty of receiving stolen property unless the person knew it was stolen "at the moment of receiving it." *State v. Cameron*, 78 N.C. 484, 491 (1878); subsequent discovery that property is stolen is not sufficient. *But see State v. Post*, 286 N.W.2d 195, 202–03 (Iowa 1979) (subsequent knowledge is enough when crime is defined not as "receiving" stolen property but as "exercising control over" stolen property).

Some jurisdictions require proof of a defendant's actual subjective knowledge that the property was stolen. *See Sumner v. State*, 849 S.W.2d 828 (Tex. App. 1992). In those jurisdictions, evidence that a reasonable person would have known that the property was stolen will not suffice. *See Gibson v. State*, 643 N.E.2d 885 (Ind. 1994).

Other jurisdictions follow the modern view in which mens rea can be inferred from all surrounding circumstances. *See* LaFave, *supra*, § 20.2, n. 71 (citing *United States v. Prezzi*, 623 F.2d 152 (10th Cir. 1980) (noting that a low price can support the inference that the purchaser knew the property was stolen); *United States v. Werner*, 160 F.2d 438 (2d Cir. 1947) (same); *State v. Butler*, 450 P.2d 128 (Ariz. Ct. App. 1969) (same); *State v. Chester*, 707 So. 2d 973 (La. 1997) (same); *Russell v. State*, 583 P.2d 690, 699 (Wyo. 1978) (thieves "must rid themselves of stolen property as quickly as possible, and willingness to sell at a grossly reduced price betrays or should betray such a predicament").)

The art dealer probably should be charged with receiving stolen property. Under the modern view, or even in a jurisdiction that requires proof of subjective knowledge, the art dealer's mens rea of knowledge can be inferred from (1) the low price; (2) Ben's statement to the art dealer: "I can sell this print to you at such a good price only because I shouldn't have it at all"; (3) the art dealer's failure to investigate the provenance of the print; (4) the fact that the art dealer contacted, on the same day she acquired the print, a foreign art collector famously uninterested in exploring the ownership history of his acquisitions; and (5) the sale of the print by the art dealer to the collector for 10 times what she had paid for it. Given these circumstances, the art dealer likely had knowledge that the print was stolen.

NOTES

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Overview of NCBE's Testing Task Force Study

The Testing Task Force is undertaking a comprehensive, future-focused study to ensure that the bar examination continues to test the knowledge, skills, and abilities required for competent entry-level legal practice in a changing profession. The study will consider the content, format, delivery method, and timing of the bar examination and the MPRE, and it will be done collaboratively, with input from stakeholders solicited throughout the study.

The Task Force has selected two independent research consulting firms—ACS Ventures LLC (ACS) and American Institutes for Research (AIR)—to support its study. ACS is a psychometric consulting firm that focuses on test design, operational support, and quality assurance within the credentialing, education, and workforce sectors. AIR is a nonprofit behavioral and social science research organization that specializes in analyzing job requirements.

The goal of the Task Force's study is to develop a set of recommendations for the NCBE Board of Trustees that is supported by the research data gathered by its consultants and that takes into consideration logistical and psychometric requirements along with stakeholder input to lay the groundwork for the next generation of the bar examination. The study will proceed in overlapping phases, with each phase building on the previous ones.

PHASE 1: Stakeholder Research

The initial phase of the study, conducted by ACS, will focus on gathering stakeholder input about the bar examination. During this phase, ACS will conduct a series of focus groups and listening sessions with stakeholders (e.g., bar admission agencies, state supreme courts, bar leaders, legal educators, law students, practitioners) to gather information about uses and perceptions of the bar examination and ideas and opinions about the future direction of the bar examination in a changing legal profession. This phase will begin in November 2018 and will overlap with the beginning of Phase 2.

PHASE 2: Practice Analysis

Some results of the first phase of the study will help inform the second phase, a practice analysis (PA) conducted by AIR and ACS to identify the job activities (tasks) of newly licensed lawyers (NLLs) and the knowledge, skills, abilities, and other characteristics (KSAOs) required to perform them. The practice analysis will be comprehensive and systematic, based on multiple sources of job knowledge (e.g., new practitioners, supervisors, legal subject matter experts) and using multiple methods to obtain input (e.g., focus groups and surveys). It will address both the current state of the profession and expected changes to the profession in the coming years to accurately identify the critical knowledge, skills, and abilities required for competent entry-level practice now and in the future.

The practice analysis will consist of five steps, each designed to allow multiple opportunities for subject-matter experts to provide input and to build on the work done in the preceding steps. The first step is already under way.

1. **Conduct environmental scan.** Review the results of the 2012 NCBE practice analysis and other available studies, reports, articles, books, websites, and online databases to develop an initial list of tasks of NLLs and the KSAOs needed to perform those tasks.

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2. **Conduct focus groups.** Conduct multiple focus groups to ask practitioners and experts about changes to the field and the future direction of the profession. Work closely with various subject matter experts, NLLs, and supervisors to refine the list of tasks and KSAOs to develop the practice analysis survey.

3. **Develop and administer practice analysis survey.** Develop an updated inventory of tasks and KSAOs informed by the first two steps and administer a nationwide web-based survey presenting this inventory to licensed lawyers for their input. Survey respondents will provide ratings on job tasks and KSAOs that will help determine criticality to entry-level practice.

4. **Conduct linkage exercises.** Conduct meetings with subject matter experts to link the critical tasks identified in the survey results to the corresponding KSAOs needed to complete each task. The purpose of the linkage exercise is to identify which KSAOs are necessary for completing the most critical work entry-level lawyers perform.

5. **Prepare practice analysis technical report.** Prepare a technical report that documents methodology, analyses, and the final list of critical tasks and KSAOs. The report and the results from this study will provide the foundation for decisions regarding any future changes to the bar examination and its test specifications.

We anticipate that this phase of the study will be completed in early 2020.

PHASE 3: Bar Examination Program Design and Test Components Design

In this phase of the project, ACS will use the information collected in the first two phases to develop multiple options for program design, taking into consideration stakeholder perspectives and needs, logistical issues, best practices in high-stakes testing, and fidelity to the practice of law (representation of the professional framework of expected competencies). ACS will lead an iterative process where the Testing Task Force reviews and considers program design options and solicits comments from stakeholders. The program design plan is expected to delineate the number of exam components, the domains that each component will cover, and the expected path/relationship among the components (e.g., pass exam A before exam B, domain-specific versus general skills). ACS will then use the program design to develop recommendations for test components design. Test components design involves decisions about the measurement format, test administration plans, and scoring strategy. The test components design will present a structured plan for the development, delivery, and maintenance of each proposed test component. We anticipate that this final phase of the study will be completed by the fall of 2020.

As the study progresses, the Task Force will publish summaries and reports of findings on its website. The Task Force expects that its study will produce useful information for the benefit of all, including data and insights about core competencies that could be adopted by other stakeholders such as law schools, bar associations, employers, and others involved in ensuring that newly licensed lawyers are prepared to practice effectively and safely.

STUDY TIMELINE

(September 2018 – September 2020)